(32,308)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 741

ELEANOR SALTONSTALL AND LAWRENCE BROOKS, PLAINTIFFS IN ERROR,

vs.

LEVERETT SALTONSTALL ET AL., TRUSTEES, AND TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

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IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

WRIT OF ERROR—Filed November 18, 1926

(Seal of the United States District Court, Massachusetts.)

The President of the United States of America to the Honorable the Judges of the[1] Supreme Judicial Court, sitting in and for the County of Suffolk, in the Commonwealth of Massachusetts, Greeting:

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Judicial Court, sitting in and for the County of Suffolk, in said Commonwealth, being the highest court of the said State in which a decision in the cause could be had, between Leverett Saltonstall, of Newton, in the County of Middlesex, Arthur D. Hill and William A. Gaston, both of Boston, in the County of Suffolk, and all of said Commonwealth, Trustees under an indenture of trust made by Peter C. Brooks, dated April 3, 1905, petitioners, and Treasurer and Receiver General of the Commonwealth of Massachusetts, James Jackson, Eleanor Saltonstall, of Newton, in the County of Middlesex, Arthur D. Hill and Frederic Winthrop, both of Boston, in the County of Suffolk, guardians of Lawrence Brooks, and all of said Commonwealth, respondents, wherein was drawn in question the validity of a statute of a State, on [fols. 3-5] the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity;[2] it appears that the said Eleanor Saltonstall and Lawrence Brooks are entitled to have the said judgment reviewed by the Supreme Court of

[1] The writ should be directed to the judges of the court of last resort whose judgment is to be reviewed, save where the record has been remitted to and remains in the lower court, in which event the writ may be directed to the judges of the lower court as a means of getting the record. See Atherton v. Fowler, 91 U. S. 143, 146; Sioux Remedy Co. v. Cope, 235 U. S. 197, 200.

[2] If only one of these jurisdictional grounds exists in the case, strike out the other.

the United States; and they having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the eighth day of November, in the year of our Lord one thousand nine hundred and twenty-six.

James S. Allen, Clerk of the[4] District Court of the United States for the District of Massachusetts.

Allowed by[3] Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[File endorsement omitted.]

[3] The writ may be allowed by the chief justice or presiding judge of the state court whose judgment is to be reviewed or a justice of the Supreme Court of the United States.

[4] The writ may be signed and issued by the clerk of the district court of the United States for that district or the clerk of the Supreme Court of the United States.

[fol. 6] SUFFOLK COUNTY:

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

In Equity

LEVERETT SALTONSTALL, of Newton, in the County of Middlesex; Arthur D. Hill and William A. Gaston, Both of Boston, in the County of Suffolk, and all of Said Commonwealth, Trustees Under an Indenture of Trust Made by Peter C. Brooks, Dated April 3, 1905, Petitioners,

v.

TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH of Massachusetts, James Jackson, Eleanor Saltonstall, of Newton, in the County of Middlesex; Arthur D. Hill and Frederic Winthrop, Both of Boston, in the County of Suffolk, Guardians of Lawrence Brooks, and All of said Commonwealth, Respondents

REPORT OF CHIEF JUSTICE—October 10, 1925

This petition for instructions came before me for hearing upon the merits. The answers of the respondents admit all the allegations of the petition except those of Paragraph 16 which relate to the law of foreign jurisdictions.

I find that it is the law of Illinois that the interest of a receipt or certificate holder or "beneficiary" in the Chicago Real Estate Trust and the Marquette Trust is personalty; that the trust agreements converted the shares in said trusts into personalty from the formation of the trusts; that the leaseholds are personalty; and that all the assets of the Marquette Trust which are described in the petition are personalty. I find that it is the Law of Illinois, Kentucky, Kansas, Wisconsin, Texas, Maine, Pennsylvania, New Jersey and New York, that a shareholder has no interest in a dividend until it has been declared by the corporation; that the courts of each of said states would have jurisdiction of a suit founded upon a trust if the trustees are personally served with process within the state; that if the trustees are non-resident and are not personally served [fol. 7] with process within the state the courts of said

state would have jurisdiction of a suit founded upon a trust to the extent that trust property located within the state is duly seized at the commencement of said suit and can lawfully be applied to satisfy the claim of the plaintiff therein; that in each of said nine states spendthrift restrictions and restrictions upon the time and manner in which payment shall be made to the beneficiary lawfully placed upon the interest of a beneficiary in a trust created elsewhere would be upheld and enforced; that it does not appear that in any of said states a non-resident beneficiary under a spendthrift trust can maintain a suit to establish his rights unless he can obtain personal service within the state upon the trustee.

These findings are based upon the following statutes and decisions which were the only evidence of the law of the several states introduced before me:

New Jersey

Compiled Statutes of New Jersey:

Vol. I. Chancery, Sec. 12.
Chancery, Sec. 13 as amended by P. L. 1912, p. 224.
Vol. II Executions, sec. 4.
Executions, Sec. 5, as amneded by P. L. 1915, p. 182.

Cases:

Andrews v. Guayaguil, 69 N. J. Eq. 211.
Amparo Murray Co. v. Fidelity Trust Co., 75 N. J. Eq. 555.

Pennsylvania

Compiled Statutes of 1920:

Sections 11,000, 11,001, 11,009, 11,016, 11,031, 10,425, 10,426, 10,427, 10,428, 10,429, 5,650, 21,273.

Cases:

Goodwin, App. v. Colwell, 213 Pa. 614 (1905).

Maine

Revised Statutes of 1916:

Chapter 73, Sec. 10, p. 1097.
Chapter 82, Sec. 6, paragraphs I, XIV, p. 1141.
Chapter 89, secs. 12-16, p. 1259.
Chapter 82, Sec. 12, p. 1145.
Chapter 86, Sec. 12, p. 1198.
Chapter 86, Sec. 21, p. 1200.

[fol. 8]

Kentucky

Carroll's Kentucky Statutes (6th Ed.) 1922:

Sections 1663, 1692.

Carroll's Kentucky Codes (6th Ed.) 1919:

Sections 194, 56, 418.

Cases:

Spalding v. Paine, 81 Ky. 416.
Bowman v. Bryfogle, 145 Ky. 443.

Texas

Statutes 1920:

Articles 1994, 1998, 3742, 3745, 2172, 2173.

New York

Civil Practice Act, 1922:

Sections 979, 646, 915, 520.

Wisconsin

Statutes of 1921:

Chapter 85, Section 1751.
Chapter 96, Section 2100.
Chapter 119, Section 2619.
Chapter 120, Section 2639.
Chapter 124, Section 2730 (5) and Sec. 2738.
Chapter 127, Sections 2793 and 2794.
Chapter 130, Sections 2989, 2990 and 2992.

Cases:

Wells-Fargo v. Walsh, 88 Wisc. 534, 60 N. W. 824.
Laughlin v. Wells Building Co., 171 N. W. 755.

Kansas

Revised Statutes of 1923:

Chapter 60, 3107.
Chapter 60, 2526.
Chapter 60, 2525.
Chapter 60, 911.
Chapter 60, 3485.

[fol. 9] Illinois

Smith's Illinois Revised Statutes of 1921:

Chapter 11, Sections 1 (1) 8, 21, 22.
Chapter 22, Sections 3, 7, 12, 14, 42, 46, 50, 53.
Chapter 77, Sections 3, 10, 55, 56, 57, 58, 59.

Cases:

Fahrig v. Milwaukee, 113 Ill. A. 525.
Williams v. Williams, 221 Ill. 541.
Cloyd v. Trotter, 118 Ill. 391.
Flexner v. Farson, 268 Ill. 435.
Dibble v. Winter, 247 Ill. 243.
Smith v. Smith, 174 Ill. 52.
Bicherdike v. Allen, 157 Ill. 95.
Regan v. West, 115 Ill. 603.
West v. Fitz, 109 Ill. 425.
Cox v. Cox, 192 Ill. A. 286.
Coe v. Garvey, 130 Ill. A. 221.
Munger v. Crowe, 115 Ill. A. 189; Aff. 219 Ill. 12.
See, also—
Pease v. Frank, 263 Ill. 500.
Mosier v. Osborn, 284 Ill. 141.

Revised Statutes of Illinois (1921) chap. 22, sec. 49.

Cases:

Davis v. Stevens-Davis Co., 192 Ill. App. 374.
Dicus v. Sherer, 277 Ill. 168.
McCormick v. McCormick, 292 Ill. 301.
Grove v. Willard, 280 Ill. 247.
Strode v. McCormick, 158 Ill. 142.
Buckner v. Carr, 302 Ill. 378.
Thornton v. Mehring, 117 Ill. 55.
Zimmerman v. Dawson, 294 Ill. 380.
Zimmerman v. Dawson, 222 Ill. App. 212.
McGovern v. McGovern, 268 Ill. 135.
Harris v. Pullman, 84 Ill. 20.
Ladd v. Judson, 174 Ill. 344.
Hunt v. Oliver, 296 Ill. 209.
Linn v. Downing, 216 Ill. 64.
[fol. 10] Binns v. La Forge, 191 Ill. 598.
Steib v. Whitehead, 111 Ill. 247.
Bennett v. Bennett, 217 Ill. 434.
Wagner v. Wagner, 244 Ill. 101.
Lunt v. Lunt, 108 Ill. 307.
Hartley v. Heirs of Wyatt, 281 Ill. 321.
Hopkinson v. Swaim, 284 Ill. 11.
Congress Hotel Co. v. Martin, 312 Ill. 318.

Kansas

Cases:

Pond v. Harrison, 96 Kan. 542.
Sherman v. Havens, 94 Kan. 654.
Everett v. Haskins, 102 Kan. 546.
Ryan v. Leavenworth A. & N. W. Ry., 21 Kan. 365.

Kentucky

Cases:

Pope v. Elliott, 8 B. Mon. 56.
White v. Thomas, 8 Bush. 661.
Arnett v. Pinson, 108 S. W. 852.
Clarey v. Union Central L. Ins. Co., 143 Ky. 540.

Maine

Cases:

Hagar v. Union Nat. Bank, 63 Me. 509.
Roberts v. Stevens, 84 Me. 325.
Murphy v. Delano, 95 Me. 229.

New Jersey

1 New Jersey Compiled Statutes, Chancery, Sec. 70.

Cases:

Frazier v. Barnum, 19 N. J. Eq. 316.
Force v. Brown, 32 N. J. Eq. 118.
Hardenburgh v. Blair, 30 N. J. Eq. 645.
Castree v. Shotwell, 73 N. J. Eq. 590.
King v. Paterson & H. R. R. Co., 29 N. J. L. 504.

[fol. 11] New York

New York Consolidated Laws, Personal Property Law, Sec. 15.
New York Consolidated Laws, Real Property Law, Secs. 98, 103.

Cases:

Graff v. Bonnett, 31 N. Y. 9.
Williams v. Thorn, 70 N. Y. 270.
Lent v. Howard, 89 N. Y. 169.
First Nat. Bank v. National Broadway Bank, 156 N. Y. 459, 472.
Everett v. Payton, 167 N. Y. 117.
Robb v. Washington & J. College, 185 N. Y. 485.
Godley v. Crandall & Godley Co., 212 N. Y. 121.
Hull v. Palmer, 213 N. Y. 315.
In re Temple, 74 N. Y. S. 479.
Siemers v. Morris, 169 App. Div. 411.
Morris v. Sheehan, 184 N. Y. S. 121 affirmed 199 App. Div. 968.

Pennsylvania

Cases:

Fisher v. Taylor, 2 Rawle 33.
Mehaffey's Estate, 139 Pa. St. 276.
McLean v. Plate Glass Co., 159 Pa. St. 112.
Seitzinger's Estate, 170 Pa. St. 500.
Siegwarth's Estate, 226 Pa. St. 591.

Texas

Cases:

Wallace v. Campbell, 53 Tex. 229.
Kelley v. Patten, 18 Tex. Civ. App. 147.
McClelland v. McClelland, 37 S. W. 350 (Tex. Civ. App.).
Wood v. McClelland, 53 S. W. 381 (Tex. Civ. App.).
Nunn v. Titche Goettinger Co., 196 S. W. 890 (Tex. Civ. App.), affirmed 245 S. W. 421 (Tex. Sup.).

Wisconsin

Wisconsin Statutes 1921:

Chap. 96 Secs. 2081, 2083, 2089.
Chap. 131 Sec. 3029.

[fol. 12] Cases:

Mowry v. Crocker, 6 Wis. 326.
Smith v. Chicago & N. W. Ry., 23 Wis. 267.
Sumner v. Newton, 64 Wis. 210.
Lamberton v. Pereles, 87 Wis. 449.
Van Osdell v. Champion, 89 Wis. 661.
Morey v. Fish Bros. Wagon Co., 108 Wis. 520.
Brown v. Gates, 120 Wis. 349.
Patton v. Patrick, 123 Wis. 218.
Bussell v. Wright, 133 Wis. 445.
International Harvester Co. v. McAdam, 142 Wis. 114.
Will of Harker, 172 Wis. 99.
Gesell v. Tomahawk L. Co., 200 N. W. 550 (Wis.)

I also find that the following corporations are incorporated under the laws of the following states respectively:

Shares in Foreign Corporations Conveyed to Trustees of 1905 Trust on April 3, 1905

	Incorporated in
Marquette Safety Deposit Co.	Illinois.
Central Safety Deposit Co., Chicago	Illinois.
Illinois Central Railroad Co.	Illinois.
The Pennsylvania Railroad Co.	Pennsylvania.
Chicago, Milwaukee & St. Paul Railway Co. com.	Wisconsin.
Chicago & Northwestern Railway Co. com.	Illinois.
Philadelphia Rapid Transit Co.	Pennsylvania.

Shares in Foreign Corporations Held by Trustees of 1905 Trust on Jan. 27, 1920

American Gas & Electric Co. pfd.	New York.
American Sugar Refining Co. pfd.	New Jersey.
American Tel. & Tel. Co.	New York.
Atchison, Topeka & Santa Fe Railway Co. pfd.	Kansas.
Chicago, Milwaukee & St. Paul Railway Co. com.	Wisconsin.
Chicago, Milwaukee & St. Paul Railway Co. pfd.	Wisconsin.
Chicago & Northwestern Ry. Co. com.	Illinois.
Commonwealth Edison Co. Chicago	Illinois.
Detroit Edison Co.	New York.
[fol. 13] Duquesne Light Co. pfd.	Pennsylvania.
Eastern Texas Elec. Co. pfd.	Texas.
Elec. Bond & Share Co. pfd.	New York.
General Electric Co.	New York.
Illinois Central R. R.	Illinois.
Brooklyn Edison Co. Inc.	New York.
Northern Texas Elec. Co. pfd.	Maine.
Northern Texas Elec. Co. com.	Maine.
Corporate Investment Associates	Maine.
McAndrews & Forbes	New Jesey.

	Incorporated in
Penn. R. R.	Pennsylvania.
Public Service Corp. of Nor. Ill. pfd.	Illinois.
Public Service Corp. of Nor. Ill. com.	Illinois.
Public Service Investment Co. pfd.	Maine.
Pullman Company	Illinois.
Ry. & Lt. Sec. Co. com.	Maine.
Ry. & Lt. Sec. Co. pfd.	Maine.
United Fruit Co.	New Jersey.
Southern Pacific Co.	Kentucky Special Statute of 1884.
Central Safety Deposit Co.	Illinois.
Marquette Safety Deposit Co.	Illinois.

and that shares in them were held by the trustees on the dates above stated. The income of the property held under the trust of 1905, so far as payable to any beneficiary, has been paid to such beneficiary by the trustees in or from Massachusetts, and no beneficiary has resorted to any court in order to enforce rights under the trust.

Since the Massachusetts Income Tax took effect in 1916, the trustees under the 1905 trust have made annual fiduciary returns, and have paid income taxes on account of the trust property to the Commonwealth thereunder.

And I report the case to the Supreme Judicial Court for the Commonwealth, upon the petition and answers and this finding of fact, such decree to be entered as, in the opinion of that court, justice and equity require.

William Cushing Wait, Justice of the Supreme Judicial Court.

October 10, 1925.

[fol. 14] In Supreme Judicial Court of Massachusetts

Petition for Instructions—Filed January 31, 1923

To the Honorable the Justices of the Supreme Judicial Court, sitting at Boston, within and for the county of Suffolk:

Respectfully represent Leverett Saltonstall of Newton in the County of Middlesex, Arthur D. Hill and William A.

Gaston, both of Boston, in the County of Suffolk, as they are Trustees under an Indenture of Trust made by Peter C. Brooks, dated April 3, 1905, a copy of which, containing all amendments thereto, is hereto attached marked "A":

1. That the petitioners are, and for a long time have been, desirous of paying to the Commonwealth any and all succession, transfer and legacy taxes due from them under its laws,—with respect to the life interests of Eleanor Saltonstall and Lawrence Brooks therein,—upon property within the jurisdiction of the Commonwealth which passed by deed, grant or gift made in contemplation of the death of said Peter C. Brooks, or made or intended to take effect in possession or enjoyment after his death, but that they have been unable to agree with the Treasurer and Receiver General upon the property, if any, upon which such taxes are lawfully assessable.

2. That on April 3, 1905, said Brooks conveyed and transferred to the petitioners, or their predecessors in title, Trustees as aforesaid, certain securities and certain cash on deposit.

That on April 10, 1905, by a supplemental indenture, said Brooks conveyed and transferred to the Trustees additional cash on deposit in a Boston bank; that on July 1, 1905, said Brooks conveyed and transferred to the Trustees further additional cash on deposit in a Boston bank; that on November 23, 1906, and again on June 24, 1907, said Brooks conveyed and transferred to them certain additional securities.

3. In stating values the petitioners have in this petition used symbols and percentages rather than exact amounts, for the sake of brevity and clearness, but details as to the charter and values of securities are on file with the Tax Commissioner, and the petitioner stands ready to furnish upon request any additional information.

4. The securities and cash, mentioned in paragraph 2 and their values when conveyed were substantially as follows:

(a) In stock in the Marquette Safety Deposit Company, an Illinois corporation	$1,075	X
(b) In stock in corporations organized in states other than Massachusetts	1,771	X

[fol. 15] (c) In cash	91. X
(d) In shares in the Chicago Rail Estate Trust, a voluntary association owing real estate in the City of Chicago	80. X
(e) In stock in Massachusetts corporations and voluntary associations other than the Marquette Trust and Chicago Real Estate Trust approximately owning	0. X
Total	$3,017. X

That the value of these securities and this cash on September 1, 1907 was $2,803, X, divided, substantially as follows:

(a) In stock in the Marquette Safety Deposit Company, an Illinois corporation	$1,075. X
(b) In stock in corporations organized in states other than Massachusetts	1,634. X
(c) In cash	14. X
(d) In shares in the Chicago Rail Estate Trust, a voluntary association, owning real estate in the City of Chicago	80. X
(e) In stock in Massachusetts corporations and voluntary associations other than the Marquette Trust and Chicago Real Estate Trust approximately owning	0. X
	$2,803. X

5. That Peter C. Books, the present Trustees and their predecessors were at all times residents of the Commonweath of Massachusetts.

6. That the trust was managed by the Trustees in Boston, Mass., the securities and cash transferred to the Trustees by Mr. Brooks were at the time of the conveyance kept in Boston, and the securities and cash owned by the Trustees have been at all times kept in Boston, Mass.

7. That Eleanor Saltonstal[l] and Lawrence Brooks are both domiciled in Massachusetts and have been domiciled there since the creation of the trust. That Sarah L. Brooks, the wife of Mr. Brooks, was domiciled in Massachusetts throughout her life.

8. Sarah L. Brooks died on July 13, 1915. Peter C. Brooks died on January 27, 1920.

9. On January 27, 1920, the date of the death of Peter C. Brooks, the property originally conveyed as described in paragraph 4 was held, or had been reinvested, or otherwise disposed of, in the following manner:

	When conveyed	Jan. 27, 1920
(a) Shares of Marquette Safety Deposit Co.		
The shares which the Trustees held in the Marquette Safety Deposit Co. had in 1911 been exchanged by them for an equal number of shares in the Marquette Trust, a voluntary trust. The value of these shares when conveyed and on January 27, 1920 was approximately as follows:	$1,075. X	$1,075. X

[fol 16]

(b) Stock in corporations organized in states other than Massachusets.		
Approximately 71.5 in value of the stock in foreign corporations was still held. The value of such shares was approximately as follows:	$1,257. X	$1,203. X
Pursuant to Article 19 of the Declaration of Trust, the trust was terminated on March 15, 1909 as to approximately $5.2 X in value of said shares (see paragraph 13 below)		Disposed of.
Approximately $514. X in value of said stock was sold and the proceeds reinvested.		

	When conveyed	Jan. 27, 1920
(c) Cash:		
The cash originally transferred had all been disposed of	91. X	Disposed of.
(d) Shares in Chicago Real Estate Trust:		
These shares were all still held. Their value was approximately as follows:	80. X	85. X
(e) Stock in Massachusetts corporations and voluntary associations other than the Marquette Trust and Chicago Real Estate Trustees	0. X	0. X

10. From the date of the creation of the trust to June 1, 1917, there was paid to Peter C. Brooks, from income, upon orders given by him pursuant to Article 1 of the trust agreement, approximately $3,893. X the balance of the income being accumulated. From June 1, 1917 until January 27, 1920, all of the income of the trust property was accumulated. The total amount of income added to principal from the creation of the trust to January 27, 1920 was approximately $2,678. X which was accumulated as follows:

From creation of trust to Sept. 1, 1907	$57. X
From Sept. 1, 1907 to May 27, 1912	384. X
From May 27, 1912 to May 26, 1916	1,236. X
From May 26, 1916 to Oct. 24, 1919	941. X
From Oct. 24, 1919 to Jan. 27, 1920	60. X
Total	$2,678. X

11. The value of the property on September 1, 1907 was $2,804. X divided as follows:

(a) In stocks of the Marquette Trust, and Illinois corporation, approximately	$1,075. X
(b) In stocks in foreign corporations, approximately	1,634. X

(c) In cash, bonds and notes, approximately	15	X
(d) In shares in the Chicago Real Estate Trust, approximately	80	X X
(e) In stocks of Massachusetts corporations and in voluntary associations other than the Marquette Trust and the Chicago Real Estate Trust, approximately	None.	X X X
Total	$2,804	X

[fol. 17] 12. The value of the property on January 27, 1920 was approximately $5,333. X divided as follows:

(a) In shares of the Marquette Trust, approximately	$1,075	X
(b) In stocks in foreign corporations, approximately	1,844	X X
(c) In cash, bonds and notes, approximately	2,185	X
(d) In shares in the Chicago Real Estate Trust, approximately	85	X X
(e) In stocks of Massachusetts corporations and in voluntary associations other than the Marquette Trust and the Chicago Real Estate Trust, approximately	144	X X X X
Total	$5,333	X

13. On March 15, 1909, the trust was terminated as to part of the property, in accordance with Paragraph 19 of the Trust Indenture, by the conveyance and transfer to Peter C. Brooks of certain stock in a corporation organized elsewhere than in Massachusetts, the value of which stock at the time it was originally conveyed to the Trustees was $52. X. The trust was never terminated as to any of the rest of the property.

14. The shares which the Trustees held in the Marquette Safety Deposit Company were in May, 1911 exchanged by them for an equal number of shares in the Marquette Trust, a voluntary trust. At the date of Mr. Brooks' death, there were five (5) Trustees of the Marquette Trust, of which two (2) were residents of Massachusetts. The Marquette Trust was at all times managed in Chicago, Illinois. A

copy of the Trust Agreement is hereto attached, marked Exhibit "B." The first paragraph of Article 17 of the Trust Agreement of the Marquette Trust provides as follows:

"At the expiration of twenty (20) years after the death of the last survivor of the following persons, viz:—Leverett Saltonstall and Richard Saltonstall, sons of Richard M. Saltonstall, of Newton, Massachusetts, and Adams Sherman Hill and Arthur Dehon Hill, Jr., sons of Arthur Dehon Hill of Boston, Massachusetts, Arthur Graham Aldis, son of Arthud T. Aldis, of Lake Forest, Illinois, Arthur Richmond Taber, son of Sydney Richmond Taber, of Lake Forest, Illinois, Fuller Chenery, son of Horace Chenery, of New York, and grandson of the late George A. Fuller, or at such earlier time as the registered beneficiaries holding two-thirds (⅔rds) or more in value of the receipts issued hereunder, may by an instrument in writing, appoint, the trustees shall terminate this trust by selling all of the property held by them as such trustees, and (after the satisfaction and discharge of all the debts and liabilities of the trust estate, of every kind and description whatsoever) by dividing the net proceeds of such sale, and any and all other moneys and any part of said Contingent Fund and [fol. 18] said Expense Fund then remaining in the hands of the trustees, among the registered beneficiaries, in proportion to the respective amounts of their interests."

In May, 1911, when the Marquette Trust was formed, its assets were approximately as follows:

Leasehold and building thereon in Chicago, Illinois	$1,500	X
Current assets, consisting of cash, accrued rents, insurance, interest and coal	46	X

On January 27, 1920, the assets of the Marquette Trust were approximately as follows:

Leasehold and building thereon in Chicago (Illinois	$1,881	X
Current assets, consisting of cash, U. S. Certificates of Indebtedness and Liberty Bonds	54 6	X

Until January 27, 1920, no Contingent Fund had ever been created by the Trustees under the provisions of paragraph 4 of the Marquette Trust Agreement.

15. At the date of Mr. Brooks' death, there were five Trustees of the Chicago Real Estate Trust, of whom two (2) were residents of Massachusetts. The Chicago Real Estate Trust was at all times managed in Chicago, Illinois. A copy of the Trust Agreement is hereto attached, marked Exhibit "C". Paragraph fourteen of the Trust Agreement of the Chicago Real Estate Trust provides as follows:

"At and upon the expiration of twenty years after the death of the last survivor of the following named persons * * * or at such earlier time as three-fourths in value of the receipt holders may, by an instrument in writing, signed and acknowledged, in the manner prescribed for the acknowledgment of deeds, and recorded in the office of the Recorder of Deeds for said Cook County, Illinois, appoint, said trustees shall terminate this trust by selling all property then held by them, as such, and dividing the proceeds among the receipt holders.

"Provided, however, that upon the request of three-fourths in value of the receipt holders in writing, signed, acknowledged and recorded as above provided, said trustees may, if it seems to them judicious so to do, convey the trust property to new or other trustees, or to a corporation, according to the terms of such request, and in the manner stated therein, being first duly indemnified for any outstanding obligation; and said trustees upon filing in said Recorder's office for Cook County, Illinois, a certificate that they have complied with such request, shall be under no further obligation, provided, however, and it is especially un- [fol. 19] derstood and agreed, that nothing in this clause contained shall be construed as making it obligatory upon said trustees to comply with such request to convey."

On April 3, 1905, when the shares of the Chicago Real Estate Trust were conveyed to the Trustees, the assets of that trust were approximately as follows:

Real Estate in Illinois	$2,969.	X
Mortgage on real estate in Illinois	55.	X
Securities	254.	X
Accounts received	1.	X
Coal	3.	X
Cash	56.	X

On said date, the Contingent Fund of the Trust provided for in paragraph six of the Trust Agreement was approximately $27,000.

On January 27, 1920, the date of Mr. Brooks' death, the assets of the trust were approximately as follows:

Real Estate in Illinois	$2,194.6 X
Securities	1,348. X
Accounts receivable, cash, etc	46.3 X
	$3,589. X

On said date, the Contingent Fund of the trust provided for in paragraph six of the trust agreement was approximately $27.1 X.

16. It is the law of the several states in which property belonging to the Trustees is situated, and in which the corporations whose shares of stock are held by the Trustees were organized, that the trust can be enforced as to such property and shares of stock by the courts of those states respectively without recourse to the laws or the courts of Massachusetts; and it is the law of all of the states generally that the trust may be enforced by the courts of any state in which the Trustees may be found, regardless of their permanent residence or domicile.

17. The Petitioners contend as a matter of law—

(a) That the transfers above set forth were not made in contemplation of death.

(b) That the transfers did not take effect in possession or enjoyment after the death of Mr. Brooks with respect to the life interest of Eleanor Saltonstall.

[fol. 20] (c) That the transfers did not take effect in possession or enjoyment after the death of Mr. Brooks with respect to the life interest of Lawrence Brooks.

(d) That, in so far as the property originally transferred consisted of stocks of corporations organized outside of Massachusetts, or in shares in the Chicago Real Estate Trust, the transfer of such stocks did not take effect by virtue of the laws of Massachusetts, and that the provisions of Chapter 65 of the General Laws of Massachusetts do not apply to such shares.

(e) That, in so far as the property at the date of Mr. Brooks' death consisted of stocks in corporations organized outside of Massachusetts, or in share in the Chicago Real Estate Trust, or in shares in the Marquette Trust, no change in possession or enjoyment with respect thereto took effect by virtue of the laws of Massachusetts and that the provisions of Chapter 65 of the General Laws of Massachusetts do not apply to such shares.

(f) That, even if that act applies to the property originally conveyed to the Trustees, it does not apply to property acquired by the Trustees through investing the income of the trust property.

(g) That said act is unconstitutional if, and in so far as, it applies to property originally conveyed to the Trustees, or to the property acquired by the Trustees through investing the income derived from the trust property, before the enactment of Chapter 463 of the Acts of 1914.

(h) That if property owned by the trust at the date of Mr. Brooks' death, which was acquired prior to May 29, 1912, is taxable, it is taxable only at the tax rates in force prior to May 29, 1912.

(i) That if property owned by the trust at the date of Mr. Brooks' death which was acquired after May 29, 1912 and prior to May 26, 1916 is taxable, it is taxable only at the tax rates in force between said dates.

(j) That if property owned by the trust at the date of Mr. Brooks' death which was acquired after May 26, 1916 and prior to May 4, 1918 is taxable, it is taxable only at the rates in force between said dates.

18. The Petitioners ask to be instructed by the Court as to:

(1) Whether they are under any obligation to pay any tax to the Commonwealth of Massachusetts by reason of the foregoing, with respect to the life interest of Eleanor Saltonstall.

(2) Whether they are under any obligation to pay any tax to the Commonwealth of Massachusetts by reason of the foregoing, with respect to the life interest of Lawrence Brooks.

(3) If under obligation to pay any such tax, whether they are required by law to pay any such tax on the value of stocks in corporations organized elsewhere than in Mas- [fol. 21] sachusetts which were conveyed to them by said Brooks, or on the value of shares in the Chicago Real Estate Trust.

(4) If under obligation to pay any such tax, whether they are required by law to pay any such tax on the value of the shares in the Marquette Trust into which had been converted the shares of the Marquette Safety Deposit Company, an Illinois corporation, conveyed to them by said Brooks.

(5) If under obligation to pay any such tax, whether they are required by law to pay any such tax on the value of any property acquired by the Trustees through investing the income of the trust property.

(6) If under obligation to pay any such tax, whether they are required by law to pay any such tax upon any property conveyed prior to the enactment of Chapter 463 of the Acts of 1914, or upon any property acquired by the Trustees prior to the enactment of said Chapter through their investment of income of the trust property.

(7) If required by law to pay any such tax with respect to property acquired by the Trustees prior to May 29, 1912, whether they are required by law to pay such tax at the tax rates in force prior to May 29, 1912, or at the tax rates in force at the date of Mr. Brooks' death.

(8) If required by law to pay any such tax with respect to property acquired by the Trustees after May 29, 1912 and prior to May 26, 1916, whether they are required by law to pay any such tax at the tax rates in force between those dates, or at the tax rates in force at the date of Mr. Brooks' death.

(9) If required by law to pay any such tax with respect to property acquired by the Trustees after May 26, 1916 and prior to May 4, 1918, whether they are required by law to pay such tax at the tax rates in force between those dates, or at the tax rates in force at the date of Mr. Brooks' death.

(10) If under obligation to pay any such tax, whether it is the duty of your Petitioners, after paying the same, to

require Eleanor Saltonstall and Lawrence Brooks to reimburse them for any such tax so paid.

Leverett Saltonstall, Arthur D. Hill, William A. Gaston, Trustees, by Their Attorney, Arthur D. Hill.

Filed January 31, 1923.

[fol. 22] EXHIBIT A.

[First part of Exhibit A attached to copies for Full Court only.]

[Continuation of Exhibit A]

Know all men by these presents that we Peter Chardon Brooks and Arthur Dehon Hill Francis Reginald Bangs Robert Shaw Barlow and Robert Homans trustees under an instrument dated April third 1905 acting herein by virtue of the power given us by the nineteenth section of said instrument and of every other power and authority us hereto in any wise enabling do hereby change the terms and provisions of the said instrument and the dispositions therein made by striking out in the second section of the said instrument the words "And after the death of my said child" and inserting in place thereof the words "but my trustees shall have power in their discretion to apply the whole or such part as they shall think proper of the net income of the share hereby given my said son Lawrence Brooks to his support and maintenance or otherwise on his behalf or at the option of my trustees to pay the same to his guardian or guardians or to such other person as my trustees shall think proper to be so applied without my trustees being liable to see to the application thereof and to accumulate and invest the unapplied surplus if any of such income and to add the same to the said share but with power at any time during the life of my said son in their discretion to apply the whole or such part as they may think proper of such accumulations to the support and maintenance of

Peter Chardon Brooks
Arthur Dehon Hill

my said son or otherwise in his behalf or to pay the same to his guardian or guardians or to such other person as they shall think proper to be so applied in the same manner as if such accumulations were income newly accruing without my trustees being liable to see to the application thereof And after the death of each of my said children Eleanor Saltonstall and Lawrence Brooks" so that the said second section shall read as follows

2. After my death my trustees shall pay the net income of one third part of the trust property to my wife Sarah Lawrence Brooks during her life And as to the two other third parts and after her death as to the whole of the trust property my trustees shall hold the same In trust for my children Eleanor Saltonstall wife of Richard Middlecot Saltonstall and Lawrence Brooks in equal shares And the share of each of my said children in the trust property shall be held by my trustees In trust to pay the net income thereof to him or her quarteryearly or oftener during his or her life and so that he or she shall not have power to dispose of the same by anticipation or to subject the same to his or her debts or liabilities but my trustees shall have power in their discretion to apply the whole or such part as they shall think proper of the net income of the share hereby given my said son Lawrence Brooks to his support and maintenance or otherwise on his behalf or at the option [fol. 23] of my trustees to pay the same to his guardian or guardians or to such other person as my trustees shall think proper to be so applied without my trustees being liable to see to the application thereof and to accumulate and invest the unapplied surplus if any of such income and to add the same to the said share but with power at any time during the life of my said son in their discretion to apply the whole or such part as they think proper of such accumulations to the support and maintenance of my said son or otherwise in his behalf or to pay the same to his guardian or guardians or to such other person as they shall think proper to be so applied in the same manner as if such accumulations were income newly accruing without my trustees being liable to see to the application thereof And after the death of each of my said children Eleanor Saltonstall and Lawrence Brooks In

Peter Chardon Brooks
Arthur Dehon Hill

trust for his or her child or children who shall be living at the death of the survivor of me and my said child and who attain the age of twenty five years or shall be living at the expiration of the period of twenty one years from the death of the last survivor of me and my brother Shepherd Brooks and my said wife and children and my grandchildren now living namely Leverett Saltonstall Eleanor Saltonstall Muriel Gurdon Saltonstall and Richard Saltonstall and if more than one in equal shares and to be transferred and divided by my trustees as such child or children become entitled to the same respectively And if any child of my said child shall have died in his or her lifetime or in my lifetime leaving issue living at the death of the survivor of me and my said child such issue attaining the age of twenty one years or living at the expiration of the said period of twenty one years or dying previously leaving issue shall take by substitution and if more than one in equal shares according to the stocks the share that such deceased child would have taken under the trusts hereinbefore contained if he or she had survived and acquired a vested interest therein And if any child of my said child shall be living at the death of the survivor of me and my said child and die without acquiring a vested interest under the said trusts leaving issue such issue attaining the age of twenty one years or living at the expiration of the said period of twenty one years or dying previously leaving issue shall take by substitution and if more than one in equal shares the share which such child so dying would have taken if he or she had lived and acquired a vested interest therein And in default of any child or children or other issue of my said child acquiring a vested interest in such child's share under the trusts hereinbefore contained my said child's share of the trust property shall be added to my other child's share thereof and be subject to the trusts and directions hereinbefore contained concerning the same for the benefit of such other child and his or her children or issue

Peter Chardon Brooks
Arthur Dehon Hill

In witness whereof I the said Peter Chardon Brooks have hereunto and to another copy of like tenor set my hand and seal and we the said Arthur Dehon Hill Francis Reginald Bangs Robert Shaw Barlow and Robert Homans have here-

[fol. 24] unto and to another copy of like tenor set our hands and we the said Peter Chardon Brooks and the said Arthur Dehon Hill have further signed our names upon each of the preceding three sheets this sixth day of January 1906

Peter Chardon Brooks (Seal), Arthur Dehon Hill, Francis Reginald Bangs, Robert Shaw Barlow, Robert Homans.

Know all men by these presents that we Peter Chardon Brooks and Arthur Dehon Hill Robert Shaw Barlow and Robert Homans trustees under an instrument dated April 3 1905 acting herein by virtue of the power given us by section 19 of the said instrument and of every other power and authority us hereto in any wise enabling do hereby terminate the trusts created by the said indenture as to — X shares of the capital stock of the American Telephone and Telegraph Company now subject to the said trusts

And I the said Peter Chardon Brooks acting herein by virtue of the power given me by the said section 19 and of every other power and authority me hereto in any wise enabling do hereby require my trustees to transfer the said shares to my daughter Eleanor Saltonstall wife of Richard Middlecott Saltonstall

In witness whereof we the said Peter Chardon Brooks and the said Arthur Dehon Hill Robert Shaw Barlow and Robert Homans have hereunto and to another copy of like tenor set our hands this 13th day of March 1909

Peter Chardon Brooks, Arthur Dehon Hill, Robert Shaw Barlow, Robert Homans.

We, Peter Chardon Brooks and Richard M. Saltonstall, Arthur Dehon Hill and Robert Homans, trustees under an instrument dated April 3, 1905, hereby change and amend section 1 thereof so as to read as follows:

1. During my life my trustees shall allow the net income to accumulate and shall from time to time invest the same and add the income so invested to the principal.

Witness our hands and seals this 24th day of October, 1919.

Peter C. Brooks (Seal), Richard M. Saltonstall (Seal), Arthur D. Hill (Seal), Robert Homans (Seal), Trustees.

[fol. 25] EXHIBITS B AND C

[Exhibits B and C attached to copies for full court only.]

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

ANSWER OF THE RESPONDENT JAMES JACKSON, TREASURER AND RECEIVER GENERAL—Filed February 8, 1923

Now comes James Jackson, respondent in the above entitled action as he is Treasurer and Receiver General, and for answer to the petition says:

1. That for the purpose of this case he admits the allegations of paragraphs one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15).

2. That he denies each and every allegation of paragraph sixteen (16).

3. That as paragraphs seventeen (17) and eighteen (18) present questions of law only, he neither admits nor denies the same but leaves the petitioners to establish the same if material.

Jay R. Benton, Attorney-General, by Edwin H. Abbott, Jr., of Counsel.

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

ANSWER OF THE RESPONDENTS ELEANOR SALTONSTALL AND ARTHUR D. HILL AND FREDERIC[K] WINTHROP, GUARDIANS OF LAWRENCE BROOKS—Filed April 4, 1923

And now come the respondents Eleanor Saltonstall, and Arthur D. Hill and Frederick Winthrop, guardians of Lawrence Brooks, and for answer admit as true all the matters set forth in the petition.

And further answering, these respondents concur with the petitioners in the contentions of law set forth in Para-

graph 17 of the petition; and these respondents submit that [fol. 26] in response to the prayers for instructions contained in Paragraph 18 of the petition, the pitioners should be instructed to the following effect:

1. The petitioners are under no obligation to pay any tax to the Commonwealth of Massachusetts with respect to the life interest of Eleanor Saltonstall.

2. The petitioners are under no obligation to pay any tax to the Commonwealth of Massachusetts with respect to the life interest of Lawrence Brooks.

And further answering these respondents submit that if the court should be of the opinion that the petitioners are under obligation to pay any such tax the petitioners should be further instructed to the following effect:

3. They are not required by law to pay any such tax on the value of stocks in corporations organized elsewhere than in Massachusetts which were conveyed to them by Peter C. Brooks, or on the value of shares in the Chicago Real Estate Trust.

4. They are not required by law to pay any such tax on the value of the shares in the Marquette Trust into which had been converted the shares of the Marquette Safety Deposit Company.

5. They are not required by law to pay any such tax on the value of any property acquired by the Trustees through investing the income of the trust property.

6. They are not required by law to pay any such tax upon any property conveyed prior to the enactment of Chapter 563 of the Acts of 1914, or upon any property acquired by the Trustees prior to the enactment of said Chapter through their investment of income of the trust property.

And further answering these respondents submit that if petitioners are required by law to pay any such tax, they are required to pay it at the following rates:

7. With respect to property acquired prior to May 29, 1912, at the rates in force prior thereto.

8. With respect to property acquired after May 29, 1912, and prior to May 26, 1916, at the rates in force between these dates.

9. With respect to all property acquired after May 26, 1916, at the rates established by the act of that date (Chapter 268 Acts of 1916).

[fols. 27 & 27½] And further answering these respondents admit that if the petitioners are required by law to pay any such tax, it is their duty, after paying the same to require these respondents to reimburse them for the tax so paid.

Eleanor Saltonstall, Arthur D. Hill, Frederick Winthrop, Guardians of Lawrence Brooks, by Their Attorneys, Gaston, Snow, Saltonstall and Hunt.

Copy. Attest: —— ——, Clerk.

[fol. 28] In Supreme Judicial Court of Massachusetts

[Title omitted]

Rescript—Filed July 10, 1926

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Decree to be entered instructing the trustees that the respective interests of the daughter and son of Mr. Brooks as of January 27, 1920, are subject to an excise under the Massachusetts law on their respective values on that date. Details to be fixed by a single justice.

By the Court.

Walter F. Frederick, Clerk.

June 29, 1926.

Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion filed with the reporter of decisions, to which reference is made.

[fol. 28½] [File endorsement omitted.]

[fol. 29] SUFFOLK, ss:

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

In Equity. No. 37200

LEVERETT SALTONSTALL et als.

vs.

TREASURER AND RECEIVER GENERAL et als.

FINAL DECREE—August 31, 1926

This cause came on to be further heard at this sitting after receipt of a rescript therein from the full bench of the Supreme Judicial Court, and was argued by counsel, and thereupon upon consideration thereof, it is ordered, adjudged and decreed in accordance with said rescript:

That the petitioning trustees be instructed that the interest of Eleanor Saltonstall and the interest of Lawrence Brooks under the deed of trust executed on April third, one thousand nine hundred and five (April 3d, 1905) by Peter C. Brooks of Medford in this commonwealth are respectively subject to the succession tax imposed by General Statutes of nineteen hundred and sixteen, chapter two hundred and sixty-eight (Gen. St. 1916, c. 268) and by the statute of nineteen hundred and nine, chapter five hundred and twenty-seven (St. 1909, c. 527) and are respectively [fols. 30 & 31] subject to the additional succession tax imposed by the General Statutes of nineteen hundred and

eighteen, chapter one hundred and ninety-one (Gen. St. 1918, c. 191) as revived and reenacted by General Statutes of nineteen hundred and nineteen, chapter three hundred and forty-two (Gen. St. 1919, c. 342), which succession taxes shall be measured by the value of each said interest at the date of the death of said Peter C. Brooks, to wit, January twenty-seven, one thousand nine hundred and twenty (January 27th, 1920), and are to be paid by the said Eleanor Saltonstall and Lawrence Brooks, respectively, each being chargeable with the tax upon the value of his or her interest.

By the Court.

John H. Flynn, Asst. Clerk.

August 31, 1926.

[fol. 32] Reporter's certificate to following paper omitted in printing.

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION—June 29, 1926

RUGG, C. J.:

This is a suit in equity by trustees holding property under an indenture of trust, asking for instructions as to their duty respecting certain excise taxes claimed by the Commonwealth. In 1905, 1906 and 1907, Peter C. Brooks transferred to the petitioners or their predecessors property of considerable value upon enumerated trusts in substance as follows, so far as here material:

(1) To pay the income to Mr. Brooks during his life or to allow it to accumulate at his option.

(2) After the death of himself and his wife to pay the income in equal shares to his children, Mrs. Saltonstall and Lawrence Brooks upon spendthrift trust provisions as to each child, (modified by later amendment so as to give to the trustees in addition discretionary power to apply the share of the son for his benefit, or to pay it to guardians, or to accumulate it).

(3) After the death of each child, to pay the income to surviving issue of such child and ultimately to divide the

principal, with gifts over in default of issue. The terms and provisions of the trust instrument might be changed and the trusts terminated by writings signed by Mr. Brooks and by one or more of the trustees. Mr. Brooks died January 27, 1920, having survived his wife and being survived by both his children. The trust instrument was changed [fol. 33] as already pointed out with respect to the son. The trust also was terminated as to certain shares of stock and the trustees required to transfer them to the daughter. In 1919 the trust instrument was further amended by providing that during the life of Mr. Brooks the entire income should be accumulated and added to the principal.

At the times of the transfers of property to the trustees in 1905, 1906 and 1907, there was no statute imposing an inheritance tax upon property passing to children. The point to be decided is whether the shares of the children of Mr. Brooks under the trust are subject to an excise to be assessed as of the date of his death. The interest which the daughter took under the trust instrument was not an absolute right to the designated share of the income with the power of alienating it in advance, but only the right to receive that share of income, which became her absolute property only upon payment to her, and not before. Broadway National Bank v. Adams, 133 Mass. 170, 173. Boston safe Deposit & Trust Co. v. Collier, 222 Mass. 390. Haskell v. Haskell, 234 Mass. 442. The interest which the son took was more attenuated because, in addition to the spendthrift trust, discretion was validly vested in the trustees to make expenditures themselves for his benefit and withhold the balance of income and add it to the principal. Foster v. Foster, 133 Mass. 179. Brown v. Lumbert, 221 Mass. 419. Wright v. Blinn, 225 Mass. 146.

The governing statutes are as follows: St. 1916, c. 268, § 1, amending the pre-existing general excise tax law on successions, St. 1909, c. 490, Part IV, § 1, so as to read in its parts material to the case at bar, in these words: "All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth, or any interest therein, • • • which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a

bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, * * * shall be subject to a tax * * *." (See now [fol. 34] G. L. c. 65 § 1.) By § 4 of said c. 268 it was provided:

"This act shall take effect upon its passage, but it shall apply only to property or interests therein passing or accruing upon the death of persons who die subsequently to the passage hereof." See G. L. c. 65, § 36. St. 1914, c. 563, amended the pre-existing general excise tax law on successions, St. 1909, c. 490, Part IV, § 25, so as to read: "This part shall not apply to estates of persons deceased prior to the date when chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven took effect, nor to property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date; but said estates shall remain subject to the provisions of law in force prior to the passage of said chapter." See G. L. c. 65, § 36. It was provided by St. 1909, c. 527, § 8, that "Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession

or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of [fol. 35] such omission or failure." * * * See G. L. c. 65,, §2. The additional taxes provided by St. 1918, c. 191, and St. 1919, c. 342, § 4, are pertinent, but no separate question of law is raised touching them and they need not be considered in detail.

All these statutes are in substance, when not in these exact words, entitled, "Taxation of legacies and successions." Their words make plain the legislative purpose to impose the excise on whatever rightly may be termed a "succession" coming within the specific statutory description. "Succession," as that word is used in the statute, has been said in numerous decisions to include the privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property. In Attorney General v. Stone, 209 Mass. 186, at page 190, occur these words: "This is an excise tax, imposed not only upon the right of the owner of the property to transmit it after his death, but upon the privilege of his beneficiaries to succeed to the property thus dealt with. Minot v. Winthrop, 162 Mass. 113, 124; Crocker v. Shaw, 174 Mass. 266, 267. The privilege is not fully exercised until the property shall have come into the possession of the beneficiary. This rule underlies the reasoning of Minot v. Treasurer & Receiver General, 207 Mass. 588. And see the cases there cited. Until the full exercise of such privilege and while as yet no tax has been assessed and paid thereon, we see no reason why, by a general rule applicable to all such cases, any pending liability to taxation may not be regulated so as to subject it to a just and uniform method of assessment, even though some change may thereby be made from the method previously adopted." In Burnham v. Treasurer & Receiver General, 212 Mass. 165, at page 167, an excise was upheld "as a tax levied upon the privilege exercised by the beneficiaries on their coming into the possession and enjoyment of the property." It is manifest from these decisions that succession includes, or may by the Legislature lawfully be described to include, as an essential element

the entering into possession and enjoyment of property by the beneficiary. See Pratt v. Dean, 246 Mass. 300. This point is covered, also, by Magee v. Treasurer & Receiver General, ante, Mass. Adv. Sh. 1613, decided this day. The [fol. 36] words of St. 1916, c. 268, § 1, to the effect that interests passing and "made or intended to take effect in possession or enjoyment after the death of the grantor or donor" shall be subject to the tax, are precisely applicable to the facts disclosed in the case at bar. The words of § 4 of the same chapter, making the tax applicable to property or interests "passing or accruing" upon the death of persons subsequent to the act, confirm what already has been said. "Accruing" in this connection has some antithesis to "passing," and was intended to include the entering into "possession or enjoyment" made subject to the tax by § 1.

The terms of the trust instrument as to change and termination of the several trusts by Mr. Brooks and one trustee include in substance and effect a power of appointment within the meaning of St. 1909, c. 527, § 8. See now G. L. c. 65, § 2. Minot v. Paine, 230 Mass. 514, 521, 522. The partial failure by Mr. Brooks, the one named individual whose affirmative action was essential under the trust instrument, to exercise such reserved power, falls within the descriptive words of said § 8 and contributes to, if it does not cause, the coming into possession and enjoyment of the property by the daughter and son as beneficiaries. This power cannot possibly be exercised after the death of Mr. Brooks. Hence the property, subject to such power and thus passing to the possession and enjoyment of the daughter and son as beneficiaries, becomes liable to the excise as of the date of the death of Mr. Brooks. Crocker v. Shaw, 174 Mass. 266. Minot v. Treasurer & Receiver General, supra. Burnham v. Treasurer & Receiver General, supra.

It is the plain import of these statutes in their collective force and effect to subject to the excise tax the interests of the daughter and son of Mr. Brooks at the time of his death. The interest of the beneficiaries took effect in enjoyment and possession after the death of Mr. Brooks, and he as founder of the trust did not prevent that result by

exercising the reserved power with the assent of one trustee to change the trust instrument in accordance with its terms.

A strong argument in behalf of the beneficiaries has been based on the circumstance that their interests to some ex- [fol. 37] extent came into being before the enactment of the first succession tax on interests of lineal descendants, and that upon strict and technical analysis subsequent statutes did not include them. Without pausing to examine this argument in detail, the present statutes cannot be rightly interpreted to exclude their interests, such as they are, from the excise.

It is assumed that an excise cannot be levied upon the mere possession or enjoyment of property. Opinion of Justices, 208 Mass. 616, 618, 619. Opinion of Justices, 220 Mass. 613. Perkins v. Westwood, 226 Mass. 268. That is not the aim or effect of the statute here in question. It imposes an excise upon succession to property and upon an interest in property accruing at a stated time as part of succession to property. Such succession comprehends as an essential part possession and enjoyment under the circumstances specified. Since the excise may be levied upon the commodity known as succession, it may validly be imposed so long as any part of that commodity remains in existence. Magee v. Treasurer & Receiver General, supra. The New York decisions like Matter of Pell, 171 N. Y. 48, in re Lansing, 182 N. J. 238, and Matter of Chapman, 196 N. Y. 561, as was said in 209 Mass. at 192, "have not commanded assent in this court."

It follows from what has been said respecting the meaning of commodity, succession, passing and accruing, as used in the Constitution and laws of Massachusetts, according to their interpretation by decisions of this court, that there is no violation of the Fourteenth Amendment of the Constitution of the United States in the excise here in question. This point seems to us to be settled by several decisions of the United States Supreme Court. Carpenter v. Pennsylvania, 17 How. 456. Cahen v. Brewster, 203 U. S. 543. Chanler v. Kelsey, 205 U. S. 466. Moffitt v. Kelly, 218 U. S. 400. Billinge v. United States, 232 U. S. 261. Nickel v. State, 256 U. S. 222. See, also, Magee v. Treasurer & Receiver General, supra, and cases there collected.

We are unable to perceive anything in Schlesinger v. Wisconsin, — U. S. — (March 1, 1926), inconsistent with the result we feel obliged to reach. The facts were different and the succession or gift there sought to be taxed was [fol. 38] held to have come to a complete end before the imposition of the tax. The same may be said of Frew v. Bowers, recently decided by the Circuit Court of Appeals of the Second Circuit, — Fed. (2d) —.

There is nothing in Welch v. Treasurer & Receiver General, 217 Mass. 348, at variance with this conclusion because the controlling statute there was different from the present statutes. By intervening enactments the Legislature has manifested a purpose to extend the sweep of the succession excise.

The nature of the excise here in question being an excise upon that part of the commodity of succession which consists of the vesting of the property in possession and enjoyment in the daughter and son, upon the death of Mr. Brooks, a vesting which arose from his failure or omission to participate in the exercise of the right of appointment reserved to him in the trust instrument to change its beneficiaries, renders inapplicable the argument in behalf of the daughter and son to the effect that the excise is in contravention of the Fourteenth Amendment as a taking of property without due process of law. The same is true of their argument that the excise impairs the obligation of any contract involved in the trust instrument.

The commodity upon which this excise is laid is within the jurisdiction of this Commonwealth. Mr. Brooks, Mrs. Brooks, their daughter and son all were residents of Massachusetts. All the cash and securities of the trust have been kept in Massachusetts and the trust always has been managed here. The legal title to all the property is in the trustees. It is the finding of the single justice that it is the law of Illinois, under which the Chicago Real Estate Trust and the Marquette Trust exist, that the interest of a receipt or certificate holder or beneficiary in each of said trusts is personalty. The trustees hold as a part of the trust fund receipts or certificates in each of said trusts. They also hold shares of stock in numerous foreign corporations. The interests of the daughter and son of Mr. Brooks under the trust accrued or passed to their actual

possession and enjoyment under the protection of the laws of Massachusetts where the founder of the trust, the trustees and the beneficiaries had their domicil and hence were [fols. 39 & 40] subject to an excise here. While it is possible, as found by the single justice, that some of their rights might be enforced under the laws of other States where the domicil of the corporations or trusts may be, this is the only jurisdiction where it is certain that all their rights can be enforced. This is the place of residence of the trustees. To our courts they may be held to respond for the performance of all their duties. The resident beneficiaries of the trust naturally would resort to our courts for the enforcement of their rights. The instrument of trust on its face appears to be a Massachusetts document. Clause 18 of the trust instrument provides that it "shall be construed and take effect in all respects according to the law of Massachusetts and in the same manner as if all real and personal estate comprised in it were situate in Massachusetts and governed by the law of that state." The situs of shares of stock in corporations and other intangible personal property as a general rule is at the domicil of the owner. Hawley v. Malden, 204 Mass. 138, affirmed in 232 U. S. 1. Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51. Maguire v. Tax Commissioner, 230 Mass. 503, affirmed in 253 U. S. 12. Keeney v. New York, 222 U. S. 525. Bullen v. Wisconsin, 240 U. S. 625. All intangible securities were actually in Massachusetts where their owners were domiciled. The cumulative effect of all these factors is that the element of succession on which the excise is levied took place in this Commonwealth with respect to property which may be made subject to our excise tax upon the commodity of succession.

The trustees have no present duty to perform as to the excise upon the corpus of the fund and hence are not entitled to present instruction on that subject.

Decree is to be entered instructing the trustees that the respective interests of the daughter and son of Mr. Brooks as of January 27, 1920, are subject to an excise under the Massachusetts law on their respective values on that date. The details are to be fixed by a single justice.

Ordered accordingly.

[fol. 41] In Supreme Judicial Court of Massachusetts

[Title omitted]

Petition for Writ of Error—Filed November 8, 1926

Respectfully represent Eleanor Saltonstall and Lawrence Brooks, Respondents in the above entitled cause, that, on the thirty-first day of August, 1926, the Supreme Judicial Court of the Commonwealth of Massachusetts, sitting at Boston, within and for the County of Suffolk, being the highest court of record in said Commonwealth, made and entered a final decree and decision herein in favor of the above Respondent, the Treasurer and Receiver General of Massachusetts, and against these Respondents, in which decree, and the proceedings had prior thereto in said cause, certain errors of law have happened, to the prejudice of these Respondents, all of which will appear more in detail from the assignments of error filed herewith.

They further represent that all of the questions of law set forth in said assignment of errors were duly presented to the highest court of the Commonwealth of Massachusetts, that is to say, to the Supreme Judicial Court for said Com-
[fol. 42] monwealth, and were there decided adversely to the contentions of these Respondents, and adversely to the existence of the federal rights claimed by them, and that the federal questions thus presented fully appear in the records, proceedings and opinion in the cause, and are substantially set forth in the assignment of errors filed herewith.

The said Eleanor Saltonstall and Lawrence Brooks, being plaintiffs in error herein, therefore pray a Writ of Error from the said decision and decree to the Supreme Court of the United States, to the end that the errors so specified and complained of may be corrected, and the said judgment and decree be reversed, and that a transcript of the records, proceedings, opinion and other papers in this cause, duly authenticated, may be transmitted to the Supreme Court of the United States.

Eleanor Saltonstall, Lawrence Brooks, by Their Attorneys, Gaston, Snow, Saltonstall & Hunt, Thomas Hunt, Robert H. Holt.

[File endorsement omitted.]

[fol. 43] In Supreme Judicial Court of Massachusetts

[Title omitted]

Assignments of Error—Filed November 8, 1926

Now come Eleanor Saltonstall and Lawrence Brooks, Respondents in the above entitled cause, being plaintiffs in error herein, and, with their petition for a writ of error, make and file the following assignment of errors, and say that there is manifest error in the records, proceedings, decree and opinion in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, they make the following assignment of errors:

The Supreme Judicial Court of Massachusetts erred in holding and deciding that Statutes of 1916, c. 268, sec. 1, and Statutes of 1909, c. 490, Statutes of 1909, c. 527, sec. 8, and Statutes of 1918, c. 191, and Statutes of 1919, c. 342, of the Commonwealth of Massachusetts, and the excise tax imposed by those laws, were constitutional and valid. The [fol. 44] validity of such laws and excise was drawn in question and denied by these Respondents, now the plaintiffs in error, on the ground of their being repugnant to the Constitution of the United States, and the amendments thereof, and in contravention thereof—the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts being in favor of the validity of said laws and excise.

The said errors are more particularly set forth and described as follows:

The Supreme Judicial Court of Massachusetts erred:

1. In entering a decree adjudging that the interests of these respondents under the trust instrument set forth in the petition were taxable by the Commonwealth of Massachusetts.

2. In holding and deciding that the statutes of Massachusetts, cited above, were not repugnant to the Constitution of the United States and the amendments thereto.

3. In holding and deciding that those statutes of Massachusetts did not impair the obligation of a contract within

the meaning of Article I, Section 10, of the Constitution of the United States.

4. In holding and deciding that the statutes of Massachusetts, cited above, and the taxes provided for therein, did not deprive these respondents, as persons thereby taxed, of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

[fol. 45] 5. In holding and deciding that the statutes of Massachusetts, cited above, did not deny to these respondents the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

6. In making and entering a decree to the effect that the taxes imposed by the statutes of Massachusetts, cited above, upon the interests of these respondents, should be paid.

7. In holding and deciding that the Commonwealth of Massachusetts had the right to tax, by means of the statutes cited above, the interests of these respondents under the trust instrument described in the petition.

8. In holding and deciding that the Commonwealth of Massachusetts had a constitutional right to tax the interests of these respondents under the trust instrument described in the petition, as being property or interests within the power and control of the Commonwealth of Massachusetts.

9. In refusing to hold that the tax imposed by the statutes of Massachusetts, cited above, impaired the obligation of a contract.

10. In refusing to hold that the tax imposed by the statutes of Massachusetts, cited above, deprived these respondents of their property without due process of law.

11. In refusing to hold that the tax imposed by the statutes of Massachusetts, cited above, denied to these respondents the equal protection of the laws.

[fols. 46-50] 12. In refusing to hold and decide that the Statutes of Massachusetts, cited above, and each of them were unconstitutional and void, as being repugnant to the

Constitution of the United States and the amendments thereto.

Eleanor Saltonstall, Lawrence Brooks, by Their Attorneys, Gaston, Snow, Saltonstall & Hunt, Thomas Hunt, Robert H. Holt.

[File endorsement omitted.]

[fol. 51] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFFS IN ERROR OF PARTS OF THE RECORD TO BE PRINTED—Filed December 7, 1926

Now come Eleanor Saltonstall and Lawrence Brooks, respondents, and plaintiffs in error in the above entitled cause, and, in compliance with Rule 9 of the court, file a statement of the points on which they intend to rely, and of the parts of the Record which they think necessary for the consideration thereof, with proof of service of the same on the adverse parties, as follows:

I

The Supreme Judicial Court of Massachusetts erred in entering a decree adjudging that the interests of the respondents, plaintiffs in error here, under the trust instrument set forth in the petition, were taxable by the Commonwealth of Massachusetts under Statutes of 1916, Chapter 268, Sec. 1, and Statutes of 1909, Chapter 490, Statutes [fol. 52] of 1909, Chapter 527, Sec. 8, and Statutes of 1918, Chapter 191, and Statutes of 1919, Chapter 342 of the Commonwealth of Massachusetts, such statutes being repugnant to the Constitution of the United States and the Amendments thereof, for the following reasons:

(1) These statutes, and the taxes provided for therein, impair the obligation of a contract within the meaning of Article I, Section 10, of the Constitution of the United States.

(2) These statutes, and the taxes provided for therein, deprive these respondents, plaintiffs in error here, as persons thereby taxed, of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

(3) These statutes, and the taxes provided for therein, deny to these respondents, plaintiffs in error here, the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

II

That the Supreme Judicial Court of Massachuetts erred in entering a decree adjudging that the interests of these respondents, plaintiffs in error here, under the trust instrument set forth in the petition, were taxable by the Commonwealth of Massachusetts.

III

That the Supreme Judicial Court of Massachusetts erred in holding, or deciding, that the Commonwealth of Massachusetts had a right to tax, by means of the statutes referred to above, the interests of these respondents, plaintiffs in error here, under the trust instrument described in [fol. 53] the petition.

IV

That the Supreme Judicial Court of Massachusetts erred in holding and deciding that the Commonwealth of Massachusetts had a right to tax the interests of these respondents, plaintiffs in error here, under the trust instrument described in the petition, as being property or interests within the power and control of the Commonwealth of Massachusetts.

V

That the Supreme Judicial Court of Massachusetts erred in holding that any interest, right, privilege or commodity of these respondents, plaintiffs in error here, under the trust instrument described in the petition, was within the scope of the taxing power of the Commonwealth of Massachusetts.

For the consideration of these points, their counsel deem the following parts of the record necessary:

1. The Report of William Cushing Wait, Justice of the Supreme Judicial Court of Massachusetts.
2. The Petition for Instructions and Exhibits.
3. The Answers of all the Respondents.
4. Rescript and Final Decree.

[fol. 54] 5. Petition for writ of error.

6. Assignment of Errors.
7. Copy of Opinion of the full bench of the Supreme Judicial Court of Massachusetts.

Robert H. Holt, Counsel for Plaintiffs in Error.

[fols. 55 & 56] Boston, Massachusetts, December 8, 1926.

I, Arthur D. Hill, attorney of record for Leverett Saltonstall, Arthur D. Hill, and William A. Gaston, trustees under an indenture of trust dated April 3, 1905, hereby acknowledge due and sufficient service of a copy of the above statement of points and designation of parts of the record to be printed.

Arthur D. Hill.

Boston, Massachusetts, December 4, 1926.

I, Edwin Hale Abbot, Jr., attorney of record for the Treasurer and Receiver General of the Commonwealth of Massachusetts, hereby acknowledge due and sufficient service of a copy of the above statement of points and designation of parts of the record to be printed.

Edwin H. Abbot, Jr., Attorney for the Treasurer & Receiver-General of Massachusetts.

[fol. 57] [File endorsement omitted.]

Endorsed on cover: File No. 32,308. Massachusetts Supreme Judicial Court. Term No. 741. Eleanor Saltonstall and Lawrence Brooks, plaintiffs in error, vs. Leverett Saltonstall et al., trustees, and Treasurer and Receiver General of the Commonwealth of Massachusetts. Filed November 26th, 1926. File No. 32,308.

[redacted]

SUPREME COURT OF THE UNITED STATES

STIPULATION AND ADDITION TO RECORD—Filed August 26, 1927

By reason of the failure of the Clerk of the Supreme Judicial Court of the Commonwealth of Massachusetts to include in the record transmitted to this Honorable Court a certain deed of trust which was in pamphlet form in the hands of each of the justices of said Supreme Judicial Court when the case was there before them, and was and is part of the record of said case, but which deed of trust was not printed in the record then before that court, it has become necessary to enlarge the record in this court, and it is, therefore, stipulated and agreed by the parties in said case that the record may be enlarged by the addition, following the words "Exhibit A" which occur on page 22 of the record, of a copy of said deed of trust, duly certified by the Clerk of the said Supreme Judicial Court of said Commonwealth, which certified copy is hereunto attached.

Thomas Hunt, Attorneys for Plaintiffs in Error.
Arthur K. Reading, Attorney General; Edwin H. Abbot, Junior, of Counsel.

Trust Created by Peter C. Brooks April 3, 1905, as Amended January 6, 1906, and October 24, 1919

[Marginal notes not contained in the original]

Words enclosed in brackets and stricken through were eliminated by amendment—words in italics were added by amendment

Know all Men by these Presents that I Peter Chardon Brooks of Medford in the County of Middlesex and Commonwealth of Massachusetts do hereby assign transfer and set over unto and to the use of Arthur Dehon Hill Francis Reginald Bangs Robert Shaw Barlow and Robert Homans* Trustees

*Resignation of F. R. Bangs accepted Nov. 13 1906
Resignation of Robert S. Barlow accepted May 18 1910
R. M. Saltonstall appointed Trustee May 18 1910

all of Boston in the County of Suffolk and said Commonwealth and their heirs executors administrators and assigns the personal property and real estate trust stock described in a schedule of even date herewith signed by me and deposited herewith In trust to manage and dispose of the same in the manner and with and subject to the powers and provisions hereinafter contained concerning the same

Income to be accumulated during life of P. C. Brooks

1 During my life my trustees shall [pay over to me or allow me to receive so much of the net income of the trust property as I shall from time to time in writing direct and shall] allow the [balance of said] net income [if any] to accumulate and shall from time to time invest the same and add the income so invested to the principal

Amendment of Oct. 24, 1919

Income—Life of Sarah L. Brooks

2 After my death my trustees shall pay the net income of one third part of the trust property to my wife Sarah Lawrence Brooks during her life And as to the two other third parts and after her death as to the whole of the trust property my trustees shall hold the same In trust for my children Eleanor Saltonstall wife of Richard Middlecott Saltonstall and Lawrence Brooks in equal shares And the share of each of my said children in the trust property shall be held by my trustees In trust to pay the net income thereof to him or her quarteryearly or oftener during his or her life and so that he or she shall not have power to dispose of the same by anticipation or to subject the same to his or her debts or liabilities [And after the death of my said child] *but my trustees shall have power in their discretion to apply the whole or such part as they shall think proper of the net income of the share hereby given my said son Lawrence Brooks to his support and maintenance or otherwise on his behalf or at the option of my trustees to pay the same to his guardian or guardians or to such other person as my trustees shall think proper to be so applied without my trustees being liable to see to the application thereof and to accumulate and invest the unapplied surplus if any of such income and to add the same to the said share but with power at any time during the life of my said son in their discretion to apply the whole or such part as they think proper of such accumulations to the support and maintenance of my said son or otherwise in his behalf or to pay the same to his guardian or guardians or to such*

Income after death of Sarah L. Brooks

Amendment of Jan. 6, 1906

Part of Lawrence's share payable to guardians, etc.

Balance of Lawrence's share to be accumulated for him

other person as they shall think proper to be so applied in the same manner as if such accumulations were income newly accruing without my trustees being liable to see to the application thereof And after the death of each of my said children Eleanor Saltonstall and Lawrence Brooks In trust for his or her child or children who shall be living at the death of the survivor of me and my said child and who attain the age of twenty five years or shall be living at the expiration of the period of twenty one years from the death of the last survivor of me and my brother Shepherd Brooks and my said wife and children and my grandchildren now living namely Leverett Saltonstall Eleanor Saltonstall Muriel Gurdon Saltonstall and Richard Saltonstall and if more than one in equal shares and to be transferred and divided by my trustees as such child or children become entitled to the same respectively And if any child of my said child shall have died in his or her lifetime or in my lifetime leaving issue living at the death of the survivor of me and my said child such issue attaining the age of twenty one years or living at the expiration of the said period of twenty one years or dying previously leaving issue shall take by substitution and if more than one in equal shares according to the stocks the share that such deceased child would have taken under the trusts hereinbefore contained if he or she had survived and acquired a vested interest therein And if any child of my said child shall be living at the death of the survivor of me and my said child and die without acquiring a vested interest under the said trusts leaving issue such issue attaining the age of twenty one years or living at the expiration of the said period of twenty one years or dying previously leaving issue shall take by substitution and if more than one in equal shares the share which such child so dying would have taken if he or she had lived and acquired a vested interest therein And in default of any child or children or other issue of my said child acquiring a vested interest in such child's share under the trusts hereinbefore contained my said child's share of the trust property shall be added to my other child's share thereof and be subject to the trusts and directions hereinbefore contained concerning the same for the benefit of such other child and his or her children or issue

After death of children—Payment of principal

After death of children— Payment of income

3 My trustees may after the determination or failure of prior life interests apply the whole or any such part as they shall think proper of the income of the expectant share for the time being of any child or issue of either of my said children in the trust property for or towards his or her maintenance education or benefit during his or her minority or at the option of my trustees may pay the same to his or her guardian or guardians or to such other person as my trustees shall think proper to be so applied without my trustees being liable to see to the application thereof and may so apply or pay the same without regard to the ability of any other person to provide for the same or the existence of any other fund available for the purpose and shall accumulate and invest the unapplied surplus if any of such income and add the same to the share from which the same shall have arisen but with power afterwards to apply or pay any such accumulations in like manner as hereinbefore provided in respect of the income of the said share And in case of any grandchild of mine that shall have attained the age of twenty one years and be under the age of twenty five years shall pay the whole of the income of his or her expectant share for the time being to such grandchild personally until he or she acquires a vested interest under the trusts hereinbefore contained or dies without having acquired such vested interest and so that my said grandchild shall not have power to dispose of the same by anticipation or to subject the same to his or her debts or liabilities

If children have no issue principal to Shepherd Brooks

4 In case there shall not be any such child or children or other issue of my said children or either of them as are intended to take the trust property absolutely under the trusts hereinbefore contained then my trustees subject to the trusts powers and provisions hereinbefore contained shall pay the net income of the whole of the trust property to my wife during her life And after her death shall hold the trust property In trust for my brother Shepherd Brooks absolutely if he shall be living at the time when this present trust takes effect in possession or if not then for his issue then living who attain the age of twenty one years or shall be living at the expiration of the above mentioned period of twenty one years or die previously leaving issue and if more than one in equal shares according to the stocks (regarding his children as the original stocks) and to be

transferred and divided by my trustees accordingly and with the like powers for the benefit of his issue during minority as in the case of children or issue of my children

Gifts to females for separate use

5 Every estate or interest herein given to any female shall be for her separate use independently of any husband and her receipts shall be effectual discharges for the same And no person to whom any reversionary future or expectant interest is hereby given shall have power to dispose thereof by anticipation or to subject the same to his or her debts or liabilities

Future interests not subject to anticipation

Conversion of real estate

6 All real estate at any time subject to any of the trusts herein expressed shall at all times be considered as personal estate for the purposes of enjoyment and transmission And my trustees shall have power to manage and improve the said real estate and to erect pull down and repair buildings and to insure against fire or other casualty and to make allowances to and arrangements with tenants and others and to grant leases at will or for any term of years either in possession or reversion and for any purpose upon any terms or conditions and to accept surrenders of leases and tenancies and to make such outlay as my trustees shall consider proper for the benefit of the said real estate No property not actually producing income shall be treated as producing income or as entitling any person to the receipt of income And my trustees shall have power to exchange any of the said real estate for other real estate and to concur in making or to institute and carry on proceedings for partition of any real estate whereof an undivided part shall be subject to any of the trusts herein expressed and to give or receive money for equality of exchange or partition

Power to manage such estate

Power to allow property to stand in Trustee's name

7 My trustees may allow any property real or personal at any time subject to any of the trusts herein expressed to stand in the names of all or any of them without the fact that they hold the same as trustees appearing They shall have power at any time or times to sell by public auction or private contract the whole or any part of the trust property in whatever state of investment the same may be and to buy in or rescind or vary any contract of sale or other contract and to resell without being responsible for loss and for any of the purposes aforesaid to execute and do all such instruments and things as they shall think proper Provided however that during my life they shall

Power of sale

Limitation on said power

not have the power to sell that part of the trust property or any portion thereof consisting of the securities hereby transferred and described in said schedule or any reinvestments thereof without my consent in writing

Apportionment of rents and income

8 All rents dividends and other payments in the nature of income shall for the purposes of the trusts hereby created be considered as accruing from day to day like interest on money lent and be apportionable in respect of time accordingly And my trustees shall have full powers of determining all questions in regard to such apportionment and all questions whether any moneys or things are to be treated as capital or income and of determining the mode in which the expenses of management and other expenses incidental to or connected with the execution of said trusts ought to be borne as between capital and income or otherwise which powers shall include (without the generality thereof being hereby restrained) the power of determining in case my trustees shall make any investment in any bond or security for money at a premium whether and to what extent and in what manner any part of the actual income of such bond or security shall be dealt with as capital with a view to prevent the diminution of capital by reason of the payment of such premium And every such determination whether made upon a question actually raised or implied in the acts or proceedings of my trustees shall be conclusive and binding upon all persons interested

Determination of questions of apportionment, capital, income, etc.

Power to allot shares

9 My trustees shall have power at any time or times to allot any part or parts of the trust property in the actual state of investment thereof for the time being or in money in or towards satisfaction of any share in the trust property and conclusively to determine in such manner as my trustees shall think fit the value of the trust property or any part or parts thereof for the purpose of such allotment and to sell every or any part or parts of the trust property for the purpose of allotting the proceeds in money and every such allotment shall take effect from such time or times and be made in such manner as my trustees shall think proper and may be made upon the terms of such sum or sums of money as my trustees may think proper being paid for equality But any property so allotted in or towards satisfaction of any share not absolutely vested in possession and immediately payable or transferable shall

remain subject to the trusts and powers of sale and leasing and management and other incidental powers and provisions herein contained in respect of the trust property as if such allotment had not been made

Shares may be kept separate or may be divided

10 My trustees may keep the different shares in the trust property undivided so long as they continue to hold the same or may at any time set apart the said shares or any of them one from another and shall render me during my life and after my death to the respective beneficiaries at least once in every year a full account of the capital and income of the trust premises

Number of Trustees

11 The number of my trustees shall be kept up to three And all the trusts herein contained in respect of different shares of the trust property shall at all times be executed by the same set of trustees and different trustees shall not hereafter be appointed in respect of different shares

Appointment of new Trustees

12 In case of any trustee for the time being hereunder desiring to resign during my life he may do so by a writing signed by him and delivered to me and in case of such resignation or in case of any vacancy occurring at any time during my life in the office of any of the trustees hereunder it shall be lawful for me to appoint by writing a new trustee in place of the trustee so resigning or to supply such vacancy but in default of the exercise of such power of appointment by me within ninety days after notice of such resignation has been delivered to me or after the occurrence of such vacancy the continuing trustee or trustees for the time being may appoint by writing served upon me a new trustee in place of the trustee so resigning or to supply such vacancy In case of any trustee for the time being hereunder desiring to resign after my death he may do so by a writing signed by him and delivered to any other trustee for the time being hereunder and in case of such resignation or in case of any vacancy occurring at any time after my death in the office of any of the trustees hereunder it shall be lawful for the continuing trustees or trustee for the time being hereunder to appoint by writing a new trustee in place of the trustee so resigning or to supply such vacancy But in default of the exercise of such powers of appointment within ninety days after the occurrence of such vacancy a new trustee shall be appointed

to supply such vacancy by some court having jurisdiction in the premises

Trustees responsible for wilful defaults

13 My trustees shall be answerable and accountable only for their own acts receipts neglects and defaults respectively and not for those of each other nor for any bank broker auctioneer or other person with whom or into whose hands any trust moneys or securities may be deposited or come nor for any loss unless the same shall happen through their own wilful default respectively They may invest any funds to be invested by them in such property real or personal as they may in their discretion see fit whether the same is a lawful investment for trustees or not They shall not be answerable or accountable for the depreciation in value of any of the securities mentioned in said schedule or of any other property at any time held by them hereunder and my said trustees and every trustee for the time being hereunder shall be exempt from giving any bond or surety My trustees shall be entitled to reasonable compensation for their services as such They or any of them may act as counsel when it is proper to employ counsel and receive reasonable compensation therefor

Investments

Compensation

Right to compromise

14 My trustees shall as to the trust property or any part thereof have power to compound or compromise or allow time or accept security for the payments of debts at any time owing to them as such trustees or any other claims and to adjust by arbitration or otherwise disputes in relation thereto or in relation to debts or claims against the trust property and to pay any such debts or claims upon any evidence that they shall think sufficient

Receipts by trustees

15 The receipts of my trustees for any money or thing paid transferred or delivered to them shall be sufficient discharges to the person or persons paying transferring or delivering the same therefor and from all liability to see to the application thereof And no purchaser shall be obliged to ascertain the occurrence or existence of any event or purpose in or for which a sale is herein authorized or directed

Devolution of powers

16 The powers and discretions herein given to my trustees shall be vested in and exercisable by the trustees or trustee for the time being hereunder And my trustees for the time being may exercise or concur in exercising all powers and discretions herein given to them notwithstand-

ing they or any of them may have a direct or other personal interest in the mode or result of exercising any such power or discretion

Absence or disability of trustee

17 When any trustee hereunder is absent from the United States or is unfit or incapable to act in the said trusts the other trustee or trustees for the time being may execute all the trusts and powers hereby vested in my trustees with the same effect as if all my trustees had joined in the execution thereof And any trustee for the time being hereunder may by power of attorney or otherwise delegate to one or more of his co-trustees or to his co-trustee for the time being power to act on his behalf and to use his name in the execution of the said trusts and powers or any of them and from time to time may revoke such delegation and for that purpose to execute such powers of attorney or other instruments as may be proper without being responsible for loss And no purchaser or other person dealing with any trustee or trustees purporting to act during such absence unfitness or incapability of any other trustee or under any such delegation of authority from any other trustee as herein provided for or authorized shall be concerned to inquire whether an occasion exists in which such action is authorized or in which such delegation is permitted or whether such delegated authority is still subsisting

Delegation of powers

Construction of instrument

18 The words child children and issue shall throughout this instrument be construed as meaning respectively child children and issue by blood only and not by adoption or otherwise This instrument shall be construed and take effect in all respects according to the law of Massachusetts and in the same manner as if all real and personal estate comprised in it were situate in Massachusetts and governed by the law of that state

Amendment and termination

19. The terms and provisions of this instrument and the dispositions hereinabove made may be changed from time to time during my life by writings signed by one or more of my trustees and by me and the trusts hereby created may at any time during my life be terminated as to all or any part of the property which may be subject to the trusts hereby created by writings signed by one or more of my trustees and by me In case of such termination so much of the trust property as to which the trust has been terminated shall be conveyed and transferred to me at such

time as I shall in writing require my trustees so to do No person shall be bound or affected by any such change or termination or by any change in the trustees hereunder unless he has actual notice thereof

Additions to trust property

20 Any additional property real or personal may be added to the trust fund by me at any time during my life with the written consent of one or more of the trustees and such property so added shall thereupon be conveyed and transferred by me to the trustees or if they shall so direct in writing shall be conveyed and transferred to or be allowed to remain in the name or names of one or more of the trustees Such additional personal property shall thereupon become subject to all the terms and provisions contained herein with reference to the personal property enumerated in the schedule of even date referred to in the preamble hereof

In witness whereof I the said Peter Chardon Brooks have hereunto and to another copy of like tenor set my hand and seal and we the said Arthur Dehon Hill Francis Reginald Bangs Robert Shaw Barlow and Robert Homans have hereunto and to another copy of like tenor set our hands in token of our acceptance of the trusts hereinabove set forth and we the said Peter Chardon Brooks and the said Arthur Dehon Hill have further signed our names upon each of the preceding ten sheets this third day of April 1905

(Signed) Peter Chardon Brooks. (Seal.) Arthur Dehon Hill. Francis Reginald Bangs. Robert Shaw Barlow. Robert Homans.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, April 3, 1905.

Then personally appeared the above named Peter Chardon Brooks and acknowledged the foregoing instrument to be his free act and deed before me

(Signed) Richard W. Hale, Justice of the Peace.

Schedule of Securities referred to in Trust Indenture between Peter Chardon Brooks and Arthur Dehon Hill and Others, Dated April 3, 1905

Chicago Real Estate Agreement and Declaration of Trust:

1 receipt—	No. 20,	for	$10,000
1 "	" 21,	"	10,000
1 "	" 22,	"	10,000
1 "	" 23,	"	10,000
1 "	" 24,	"	10,000
5 receipts—		"	$50,000 each dated May 13, 1891.
1 receipt—	No. 160,	"	$50,000 " May 6, 1892.

Total, 6 receipts, $100,000

Marquette Safety Deposit Company:

1 certificate—No. 1, dated December 28, 1893, for	4,100 shares.
1 certificate—No. 23, dated July 22, 1896, for	4,800 "
1 certificate—No. 24, dated August 3, 1896, for	800 "
1 certificate—No. 53, dated May 28, 1900, for	50 "
1 certificate—No. 57, dated January 30, 1903, for	1,000 "
5 certificates for	10,750 "
Total, 5 certificates	10,750 shares.

Central Safety Deposit Co. of Chicago:

19 certificates, Nos. 24 to 42 inclusive, dated 11 Nov. 1886, each for 100 shares =	1,900 shares.
1 certificate, No. 43, dated 11 Nov. 1886 =	20 "
6 certificates, Nos. 62 to 67 inclusive, dated June 25, 1887, for 100 shares =	600 "
1 certificate, No. 68, dated June 27, 1887 =	40 "
8 certificates, Nos. 79 to 86 inclusive, dated August 10, 1888, for 100 shares	800 "
1 certificate, No. 87, dated August 9, 1888 =	50 "
1 certificate, No. 111, dated January 10, 1896 =	100 "
1 certificate, No. 113, dated March 23, 1896 =	100 "
38 certificates, =	3,610 "
Total, 38 certificates	3,610 shares.

Illinois Central Railroad (Office 214 Broadway, New York):

1	certificate,	No.	H 37,461,	for	100 shares
1	"	"	H 37,642,	"	100 "
1	"	"	H 37,463,	"	100 "
1	"	"	H 37,464,	"	100 "
1	"	"	H 37,465,	"	100 "
1	"	"	H 37,466,	"	100 "
1	"	"	H 37,467,	"	100 "
1	"	"	H 37,468,	"	100 "
1	"	"	H 37,469,	"	100 "
1	"	"	H 37,470,	"	100 "
10	certificates			"	1,000 "

Registered. Dividends March 1, September 1.

Total, 10 certificates ..... 1,000 shares

Pennsylvania Railroad (Robert W. Smith, Treasurer, Broad Street Station, Philadelphia):

1	certificate,	No.	A 81,589,	for	100 shares
1	"	"	A 53,221,	"	100 "
1	"	"	A 81,590,	"	100 "
1	"	"	A 81,591,	"	100 "
1	"	"	A 81,592,	"	100 "
1	"	"	A 81,593,	"	100 "
1	"	"	A 81,594,	"	100 "
1	"	"	A 81,595,	"	100 "
1	"	"	A 81,596,	"	100 "
1	"	"	A 81,597,	"	100 "
1	"	"	A 81,598,	"	100 "
1	"	"	A 81,742,	"	100 "
1	"	"	A 81,743,	"	100 "
1	"	"	A 81,744,	"	100 "
1	"	"	A 81,745,	"	100 "
1	"	"	A 81,746,	"	100 "
1	"	"	A 81,747,	"	100 "
1	"	"	A 81,748,	"	100 "

1 certificate,	No.	A 81,749,	for	100	shares.
1 "	"	A 81,750,	"	100	"
1 "	"	A 81,751	"	100	"
20 certificates,			"	2,000	"

($50 each at par)

Dividends about May 21 and November 21.
Total, 20 certificates, 2,000 shares.

Chicago, Milwaukee & St. Paul Railroad. (Union Trust Co. N. Y. is the transfer agent, P. O. Box 810 Broadway, New York, N. Y.)

1 certificate,	No.	A 52,453,	for	100	shares.
1 "	"	A 52,455,	"	100	"
1 "	"	A 52,485,	"	100	"
1 "	"	A 52,532,	"	100	"
1 "	"	A 52,454,	"	100	"
1 "	"	A 53,221,	"	100	"
1 "	"	A 53,222,	"	100	"
1 "	"	A 53,223,	"	100	"
1 "	"	A 53,224,	"	100	"
1 "	"	A 53,276,	"	100	"
10 certificates,			"	1000	"

Total, 10 certificates, 1,000 shares "Common" stock.

1 certificate,	No.	099,241,	for	100	shares.	
1 "	"	038,693,	"	50	"	
1 "	"	099,368,	"	100	"	
1 "	"	099,489,	"	100	"	
1 "	"	099,537,	"	100	"	
1 "	"	099,768,	"	100	"	
6 certificates,			"	550	"	Common stock.

Dividends in January and July.
Total, 6 certificates, 550 shares.

Philadelphia Rapid Transit

1 certificate, No. 10961, dated Feb. 20, 1905, for	100	shares.
1 " " 2416, " " 20, " "	50	"
15 certificates, Nos. N. 18 to N. 32 inclusive, for 100 shares each, dated March 2, 1905	1,500	"
1 certificate, No. N 1 dated March 2, 1905 for	60	"
1 certificate, No. P 1135, dated March 3, 1905 for	100	"
1 certificate No. P 21, dated March 3, 1905 for	15	"
20 certificates,	" 1,825	"

Total, 20 certificates, 1,825 shares.
(40% paid in.)

Balance of cash in State Street Trust Company, $246.39.

For the purpose of identifying this schedule, I, Peter Chardon Brooks, and I, Arthur Dehon Hill, have signed this and another copy upon this page and the two preceding pages.

(Signed) Peter Chardon Brooks. (Signed) Arthur Dehon Hill.

First Addition to Trust Fund under Trust Indenture between Peter Chardon Brooks and Arthur Dehon Hill and Others dated April 3 1905

Whereas by the trust indenture above referred to it is provided that additional property real or personal may be added by said Peter Chardon Brooks at any time during his lifetime to the trust fund created thereby with the written consent of one or more of the trustees under said indenture The said Peter Chardon Brooks now desires to add certain personal property to the trust fund

Now therefore I the said Peter Chardon Brooks hereby transfer assign and set over to the said Arthur Dehon Hill Francis Reginald Bangs Robert Shaw Barlow and Robert Homans trustees under the said indenture the sum of eighty two thousand five hundred dollars now on deposit in my name in the State Street Trust Company and we the said Arthur Dehon Hill Francis Reginald Bangs Robert Shaw Barlow and Robert Homans trustees under the said inden-

ture hereby consent to said transfer and agree to hold said property in trust as provided in said indenture

In witness whereof I the said Peter Chardon Brooks have hereunto and to another copy of like tenor set my hand and seal and we the said Arthur Dehon Hill Francis Reginald Bangs Robert Shaw Barlow and Robert Homans have hereunto and to another copy of like tenor set our hands this tenth day of April 1905

(Signed) Peter Chardon Brooks. (Seal.) Arthur Dehon Hill. Robert Shaw Barlow. Francis Reginald Bangs. Robert Homans.

Second Addition to Trust Fund under Trust Indenture between Peter Chardon Brooks and Arthur Dehon Hill and Others dated April 3 1905

Whereas by the trust indenture above referred to it is provided that additional property, real or personal, may be added by said Peter Chardon Brooks at any time during his lifetime to the trust fund created thereby with the written consent of one or more of the trustees under said indenture and

Whereas the said Peter Chardon Brooks now desires to add certain personal property to the trust fund

Now therefore I the said Peter Chardon Brooks hereby transfer, assign and set over to the said Arthur Dehon Hill, Francis Reginald Bangs, Robert Shaw Barlow and Robert Homans, trustees under the said indenture, the sum of eighty-three hundred and forty-six dollars, and we the said Arthur Dehon Hill, Francis Reginald Bangs, Robert Shaw Barlow and Robert Homans, trustees under the said indenture, hereby consent to said transfer and agree to hold said property in trust as provided in said indenture

In witness whereof I, the said Peter Chardon Brooks, have hereunto and to another copy of like tenor set my hand and seal, and we, the said Arthur Dehon Hill, Francis Reginald Bangs, Robert Shaw Barlow and Robert Homans, trustees under said indenture, have hereunto and to another copy of like tenor set our hands this first day of July, 1905.

(Signed) Peter Chardon Brooks. (Seal.) Arthur Dehon Hill. Francis Reginald Bangs. Robert Shaw Barlow. Robert Homans.

Third Addition to Trust Fund under Trust Indenture between Peter Chardon Brooks and Arthur Dehon Hill and Others dated April 3 1905

Whereas by the trust indenture above referred to it is provided that additional property real or personal may be added by said Peter Chardon Brooks at any time during his lifetime to the trust fund created thereby with the written consent of one or more of the trustees under said indenture and

Whereas the said Peter Chardon Brooks now desires to add certain personal property to the trust fund and

Whereas Francis Reginald Bangs one of the original trustees under said indenture has resigned by instrument dated November 4 1906 leaving as trustees under said indenture Arthur Dehon Hill Robert Shaw Barlow and Robert Homans.

Now therefore I the said Peter Chardon Brooks hereby transfer assign and set over to the said Arthur Dehon Hill Robert Shaw Barlow and Robert Homans trustees under the said indenture two thousand shares of the capital stock of The Pullman Company and we the said Arthur Dehon Hill Robert Shaw Barlow and Robert Homans trustees under the said indenture hereby consent to said transfer and agree to hold said property in trust as provided in said indenture.

In witness whereof I the said Peter Chardon Brooks have hereunto and to another copy of like tenor set my hand and seal and we the said Arthur Dehon Hill Robert Shaw Barlow and Robert Homans trustees under said indenture have hereunto and to another copy of like tenor set our hands this twenty-third day of November 1906

Peter Chardon Brooks. (Seal.) Arthur Dehon Hill
Robert Shaw Barlow. Robert Homans.

Fourth Addition to Trust Fund under Trust Indenture between Peter Chardon Brooks and Arthur Dehon Hill and Others dated April 3, 1905.

Whereas by the trust indenture above referred to it is provided that additional property real or personal may be added by said Peter Chardon Brooks at any time during his lifetime to the trust fund created thereby with the written consent of one or more of the trustees under said indenture and

Whereas the said Peter Chardon Brooks now desires to add certain personal property to the trust fund and

Whereas Francis Reginald Bangs one of the original trustees under said indenture has resigned by instrument dated November 4 1906 leaving as trustees under said indenture Arthur Dehon Hill Robert Shaw Barlow and Robert Homans

Now therefore I the said Peter Chardon Brooks hereby transfer assign and set over to the said Arthur Dehon Hill Robert Shaw Barlow and Robert Homans trustees under the said indenture two thousand one hundred and fifty shares of the capital stock of the American Telephone and Telegraph Company and we the said Arthur Dehon Hill Robert Shaw Barlow and Robert Homans trustees under the said indenture hereby consent to said transfer and agree to hold said property in trust as provided in said indenture

In witness whereof I the said Peter Chardon Brooks have hereunto and to another copy of like tenor set my hand and seal and we the said Arthur Dehon Hill Robert Shaw Barlow and Robert Homans trustees under said indenture have hereunto and to another copy of like tenor set our hands this twenty-fourth day of June 1907.

Peter Chardon Brooks. (Seal.) Arthur Dehon Hill
Robert Shaw Barlow Robert Homans

Commonwealth of Massachusetts.

Supreme Judicial Court

SUFFOLK, ss.

I hereby certify that the foregoing is a true copy of Exhibit "A" in the case of Eleanor Saltonstall v. Leverett Saltonstall, et als., #37200 Equity on the files of this Court and was, and is, a part of the record in said case, and was omitted when the record was made up in this Court for the transmission of said case to the Supreme Court of the United States.

John F. Cronin, Clerk.

August 20, 1927.

[File endorsement omitted.]

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 144

ELEANOR SALTONSTALL AND LAWRENCE BROOKS, RESPONDENTS, *Plaintiffs-in-Error*

v.

LEVERETT SALTONSTALL ET AL., TRUSTEES, PETITIONERS, AND TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR ELEANOR SALTONSTALL AND LAWRENCE BROOKS, RESPONDENTS, PLAINTIFFS-IN-ERROR

The official report of the opinion in the court below is

Leverett Saltonstall and Others, Trustees v. *Treasurer and Receiver General and Others*, 256 Mass. 519.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Upon the Petition (Record, p. 11) of the Trustees (defendants-in-error) for instructions as to their duty in regard to the payment of a succession tax under these statutes of Massachusetts, which are printed elsewhere in this brief (Appendix), the full bench of the Supreme Judicial Court of Massachusetts, by its rescript, filed July 10, 1926 (Record, p. 28), ordered the entry of a decree instructing the petitioning Trustees that "the respective interests of the

daughter and son of Mr. Brooks" (the plaintiffs-in-error here) were "subject to an excise under the Massachusetts law on their respective values" on January 27, 1920; and on August 31, 1926, a decree in accordance with that rescript was entered in the Supreme Judicial Court for Suffolk County (Record, p. 29).

As required by the provisions of General Laws of Massachusetts, Chapter 211, Secs. 8 and 9, the rescript contained a brief statement of the reasons for the decision, and this statement was as follows:

> "The reasons of the decision are set forth at length in the opinion filed with the reporter of decisions, to which reference is made" (Record, p. 29).

In that opinion, which was thus made a part of the record of the case, the court considered the question, necessarily raised by the Petition (Record, p. 20) and by the brief of the respondents Eleanor Saltonstall and Lawrence Brooks, whether the statutes which imposed the tax, if held applicable to their interests, were invalid on the ground of their being repugnant to the Constitution of the United States, and it held that these statutes were constitutional (Record, pp. 35, 36).

Thereupon these respondents brought a petition for a writ of error (Record, p. 38) to the Supreme Judicial Court, in accordance with the provisions of Sec. 237 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925.

The decree entered by that court is a "final decree" within the meaning of those words as used in the Judicial Code. It was entitled "Final Decree," was entered by the court after consideration of the entire cause on its merits, after having before it, and within its jurisdiction, and having fully heard, all the parties in interest. This decree contained a definite order as to the payment of the tax, and, so far as the courts of Massachusetts are concerned, determined finally the particular cause. It has frequently been held by

this court that that is sufficient to satisfy the requirement of "finality" in the Judicial Code.

Weston et al v. *The City Council of Charleston*, 2 Pet. *440, *464.

Detroit, etc., Railway v. *Michigan Railroad Co.*, 240 U. S. 564, 570, and cases there cited.

The questions decided in the opinion are, doubtless, *res judicata*, as between all the parties, except so far as they are reviewable by this court.

The Petition of the Trustees necessarily raised every question of law which bore upon the validity of the tax, including the constitutionality of the statutes by which it was imposed. Moreover, the opinion itself makes it clear that the constitutional questions now presented to this court were in fact actually considered, and passed upon, by the Massachusetts court.

The opinion says:

> "It follows from what has been said respecting the meaning of commodity, succession, passing and accruing, as used in the Constitution and laws of Massachusetts, according to their interpretation by decisions of this court, that there is *no violation of the Fourteenth Amendment* of the Constitution of the United States in the excise here in question" (Record, p. 35).
>
> "The nature of the excise here in question being an excise upon that part of the commodity of succession which consists of the vesting of the property in possession and enjoyment in the daughter and son, upon the death of Mr. Brooks, a vesting which arose from his failure or omission to participate in the exercise of the right of appointment reserved to him in the trust instrument to change its beneficiaries, renders inapplicable *the argument in behalf of the daughter and son* to the effect that the excise is in contravention of the Fourteenth Amendment as a taking of property without due process of law. The same is true of *their argument* that the excise impairs the obligation of any contract involved in the trust instrument" (Record, p. 36).

The opinion also says:

> "The commodity upon which this excise is laid is within the jurisdiction of this Commonwealth" (Record, p. 36).

The opinion also says:

> "The cumulative effect of all these factors is that the element of succession on which the excise is levied took place in this Commonwealth with respect to property which may be made subject to our excise tax upon the commodity of succession" (Record, p. 37).

This proceeding was a "suit" within the meaning of the Judicial Code. A petition by trustees, or other fiduciaries, for instructions has always been considered by the courts of Massachusetts as within their general equity jurisdiction whenever there was a real controversy.

Hooper v. *Hooper,* 9 Cush. 122.
Treadwell v. *Cordis,* 5 Gray, 341.
Old Colony Trust Co. v. *Shaw,* Massachusetts Advance Sheets, 1927, page 1867.

The mere fact that the same parties may eventually be before the court in some other form of proceeding involving the same subject matter is no bar to the consideration of the decree in this suit on a writ of error. In *Weston* v. *Charleston,* supra, Mr. Chief Justice Marshall said (at p. *464):

> "The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass."

This court has entertained analogous cases on writs of error.

See *McPherson* v. *Blacker,* 146 U. S. 1.
Rio Grande Railway v. *Stringham,* 239 U. S. 44.

The Federal questions enumerated in the Assignments of Error (Record, p. 39) were severally presented to, and considered and determined by, the Supreme Judicial Court in its opinion (Record, pp. 35, 36, 37), and the opinion of a state court may properly be, and is, considered by this court in determining whether a federal question was seasonably presented and was passed upon. This court has always considered the opinion when the state statute, or practice, as in this case (supra, p. 2), makes it part of the record.

Gross v. *United States Mortgage Co.*, 108 U. S. 477.

Krieger v. *Shelby Railroad Co.*, 125 U. S. 39.

Thompson v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456.

Even where the opinion is not, by the law of the state, a part of the record, this court has, nevertheless, felt that the amendment to the Judicial Code of February 5, 1867, has given it power to examine the opinion in order to determine the question of jurisdiction.

Murdock v. *City of Memphis*, 20 Wall. 590, 633.

Philadelphia Fire Association v. *New York*, 119 U. S. 110.

Loeb v. *Columbia Townships Trustees*, 179 U. S. 472, 484.

Missouri, Kansas & Texas Ry. Co. v. *Elliot*, 184 U. S. 530, 533, 534.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

The Supreme Judicial Court of Massachusetts erred:

1. In entering a decree adjudging that the interests of these respondents under the trust instrument set forth in the petition were taxable by the Commonwealth of Massachusetts.

2. In holding and deciding that the statutes of Massachusetts, referred to in its opinion, were not repugnant to the Constitution of the United States and the amendments thereto.

3. In holding and deciding that those statutes of Massachusetts did not impair the obligation of a contract within the meaning of Article I, Section 10, of the Constitution of the United States.

4. In holding and deciding that those statutes of Massachusetts, and the taxes provided for therein, did not deprive these respondents, as persons thereby taxed, of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

5. In holding and deciding that those statutes of Massachusetts did not deny to these respondents the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

6. In making and entering a decree to the effect that the taxes imposed by those statutes of Massachusetts upon the interests of these respondents should be paid.

7. In holding and deciding that the Commonwealth of Massachusetts had the right to tax, by means of those statutes, the interests of these respondents under the trust instrument described in the Petition.

8. In holding and deciding that the Commonwealth of Massachusetts had a constitutional right to tax the interests of these respondents under the trust instrument described

in the Petition, as being property or interests within the power and control of the Commonwealth of Massachusetts.

9. In refusing to hold that the tax imposed by those statutes of Massachusetts impaired the obligation of a contract.

10. In refusing to hold that the tax imposed by those statutes of Massachusetts deprived these respondents of their property without due process of law.

11. In refusing to hold that the tax imposed by those statutes of Massachusetts denied to these respondents the equal protection of the laws.

12. In refusing to hold and decide that those statutes of Massachusetts, and each of them, were unconstitutional and void, as being repugnant to the Constitution of the United States and the amendments thereto.

STATEMENT OF THE CASE

This was a Petition in Equity filed by the Trustees under an Indenture of Trust made in 1905 asking for the instructions of the court as to their duty with reference to the payment of certain taxes claimed by the Commonwealth of Massachusetts.

The material facts are these:—

On April 3 and 10 and July 1, 1905, and on November 23, 1906, and June 24, 1907, Peter C. Brooks transferred and delivered to the Petitioners, in trust, property consisting of,—

(*a*) Certain shares of the capital stock of the Marquette Safety Deposit Co., an Illinois corporation;
(*b*) Certain shares of stock in other corporations organized in states other than Massachusetts;
(*c*) Certain shares in the Chicago Real Estate Trust, a voluntary association owning real estate in Chicago;
(*d*) Certain sums of cash.

Petition, page 12, paragraphs 2, 4.

The Indenture of Trust, so far as its terms are material for present purposes, provided, in substance, as follows:—

(1) The Trustees were to pay over to Mr. Brooks during his life so much of the income as he might direct, and to add the balance to the principal; *but, by amendment made in 1919, it was provided that the entire income should, during the life of Mr. Brooks, be accumulated and added to the principal.*

(2) After his death to pay one-third of the income to Mrs. Brooks and two-thirds of it (after her death the whole) in equal shares to his children, Mrs. Saltonstall and Lawrence Brooks.

(3) After the death of each child to pay the income to the surviving issue of that child, and to divide the principal ultimately among their issue *per stirpes.*

(4) By amendment, made January 6, 1906, the Trustees were given the power to apply Lawrence Brooks'

share of the income for his benefit, or to pay it to his guardians, or to accumulate it, as they in their discretion might see fit.

(5) If there were no issue of Mr. Brooks' children, then, after their death, the entire income is to be paid to Mrs. Brooks, and, after her death, the principal to his brother, Shepherd Brooks, or his issue.

(6) No future interest in the trust property can be disposed of by anticipation or be subjected to liabilities of the beneficiaries.

(7) The terms and provisions of the instrument may be changed from time to time, and the trusts thereby created may be terminated at any time during the life of Mr. Brooks "by writings signed by one or more" of the Trustees, and by him, and, in case of such termination, any part of the trust property shall be conveyed to him upon his written requisition.

See Indenture of Trust (printed in a separate volume entitled "Stipulation and Addition to Record").

Mr. Brooks, Mrs. Brooks, Mrs. Saltonstall, Lawrence Brooks and the Trustees were at all times residents of Massachusetts. The cash and securities have always been kept in Boston and the Trust has always been managed here.

Petition, page 13, paragraphs 5, 6, 7.

Mrs. Brooks died July 13, 1915, and Peter C. Brooks himself on January 27, 1920.

Petition, page 14, paragraph 8.

Between the creation of the Trust and June 1, 1917, there was paid to Peter C. Brooks from income, upon his orders, approximately $389,000, the balance of the income being accumulated.

From June 1, 1917, to January 27, 1920, all the income was accumulated.

Petition, page 15, paragraph 10.

The total amount of income thus accumulated was as follows:—

From creation of trust to Sept. 1, 1907	$57,000
From Sept. 1, 1907 to May 27, 1912....	384,000
From May 27, 1912 to May 26, 1916....	1,236,000
From May 26, 1916 to Oct. 24, 1919....	941,000
From Oct. 24, 1919 to Jan. 27, 1920....	60,000
Total	$2,678,000

Petition, page 15, paragraph 10.

The value of the property on September 1, 1907, was $2,804,000 divided as follows:—

(*a*) In stocks of the Marquette Safety Deposit Co., an Illinois corporation, approximately	$1,075,000
(*b*) In stocks in foreign corporations, approximately	1,634,000
(*c*) In cash, bonds and notes, approximately	15,000
(*d*) In shares in the Chicago Real Estate Trust, approximately...	80,000
(*e*) In stocks of Massachusetts corporations and in voluntary associations other than the Chicago Real Estate Trust, approximately	None
Total	$2,804,000

Petition, pages 15, 16, paragraph 11.

The value of the property on January 27, 1920, was approximately $5,333,000 divided as follows:—

(*a*) In shares of the Marquette Trust, approximately	$1,075,000
(*b*) In stocks in foreign corporations, approximately	1,844,000
(*c*) In cash, bonds and notes, approximately	2,185,000
(*d*) In shares in the Chicago Real Estate Trust, approximately...	85,000

(*e*) In stocks in Massachusetts corporations and in voluntary associations other than the Marquette Trust and the Chicago Real Estate Trust, approximately	144,000
Total	$5,333,000

Petition, page 16, paragraph 12.

On March 15, 1909, the Trust was terminated as to part of the property by the transfer to Peter C. Brooks of certain stock in a foreign corporation the value of which at the time that it came originally to the Trustees was $52,000. The Trust has never been terminated as to any of the rest of the property.

Petition, page 16, paragraph 13.

On January 27, 1920, the date of Mr. Brooks' death,—

(*a*) The shares of the Marquette Safety Deposit Co. had become an equal number of shares in the "Marquette Trust," a voluntary association, for which they had been exchanged in 1911.

Petition, page 14, paragraph 9.

(*b*) Approximately 71.5% in value of the stock in foreign corporations was still held.

(*c*) The cash originally held had all been disposed of.

(*d*) The shares in the Chicago Real Estate Trust were still held.

(*e*) There were no shares of stock in Massachusetts corporations or in voluntary associations other than the Marquette and Chicago Real Estate Trusts.

Petition, pages 14, 15, paragraph 9.

MARQUETTE TRUST

At the date of Mr. Brooks' death there were five Trustees of the Marquette Trust, of whom two were residents of

Massachusetts. That Trust was at all times managed in Chicago. The Marquette Trust Agreement provided that, at the end of twenty years after the death of the survivor of certain named persons, the Trustees should terminate the Trust by selling all the property and dividing the net proceeds, and also any parts of the Contingent Fund and Expense Fund then remaining, among the beneficiaries, in proportion to their interests.

Petition, pages 16, 17, paragraph 14.

In May, 1911, when the Marquette Trust was formed, its assets were approximately as follows:

Leasehold and building thereon in Chicago, Illinois	$1,500,000
Current assets, consisting of cash, accrued rents, insurance, interest and coal	46,000

Petition, page 17, paragraph 14.

On January 27, 1920, the assets of the Marquette Trust were approximately as follows:

Leasehold and building thereon in Chicago, Illinois	$1,881,000
Current assets, consisting of cash, ac- Certificates of Indebtedness and Liberty Bonds	54,600

Petition, page 17, paragraph 14.

On January 27, 1920, no Contingent Fund had ever been created by the Trustees under the Marquette Trust Agreement.

Petition, page 18, paragraph 14.

CHICAGO REAL ESTATE TRUST

At the time of Mr. Brooks' death there were five Trustees of the Chicago Real Estate Trust, of whom two were residents of Massachusetts, and that Trust was at all times

managed in Chicago. The Trust Agreement provided that, at the end of twenty years after the death of the survivor of certain named persons or, in a certain event, at an earlier date, the Trust should be terminated by selling all the property and dividing the proceeds among the receipt-holders.

Petition, page 18, paragraph 15.

On April 3, 1905, the assets of the Chicago Real Estate Trust were approximately as follows:

Real Estate in Illinois	$2,969,000
Mortgage on real estate in Illinois ...	55,000
Securities	254,000
Accounts received	1,000
Coal	3,000
Cash	56,000

On that date, the Contingent Fund of the Trust provided for in paragraph six of the Trust Agreement was approximately $27,000.

On January 27, 1920, the date of Mr. Brooks' death, the assets of the trust were approximately as follows:

Real Estate in Illinois	$2,194,600
Securities	1,348,000
Accounts receivable, cash, etc.	46,300
Total	$3,588,900

On that date, the Contingent Fund of the Trust provided for in paragraph six of the trust agreement was approximately $27,000.

Petition, pages 18, 19, paragraph 15.

The allegations of the first fifteen paragraphs of the Petition are admitted in terms by the answers.

The court has found as a fact that it is the law of Illinois that:

> "The interest of a receipt or certificate holder or 'beneficiary' in the Chicago Real Estate Trust and the Marquette Trust is personalty; that the trust agree-

ments converted the shares in said trusts into personalty from the formation of the trusts; that leaseholds are personalty; and that all the assets of the Marquette Trust which are described in the petition are personalty. I find that it is the law of Illinois, Kentucky, Kansas, Wisconsin, Texas, Maine, Pennsylvania, New Jersey and New York, that a shareholder has no interest in a dividend until it has been declared by the corporation; that the courts of each of said states would have jurisdiction of a suit founded upon a trust if the trustees are personally served with process within the state; that if the trustees are non-resident and are not personally served with process within the state the courts of said state would have jurisdiction of a suit founded upon a trust to the extent that trust property located within the state is duly seized at the commencement of said suit and can lawfully be applied to satisfy the claim of the plaintiff therein; that in each of said nine states spendthrift restrictions and restrictions upon the time and manner in which payment shall be made to the beneficiary lawfully placed upon the interest of a beneficiary in a trust created elsewhere would be upheld and enforced; that it does not appear that in any of said states a nonresident beneficiary under a spendthrift trust can maintain a suit to establish his rights unless he can obtain personal service within the state upon the trustee.

"These findings are based upon the following statutes and decisions which were the only evidence of the law of the several states introduced before me:" (Citing authorities.)

Record, pages 3, 4.

The court has also found in what states the different corporations are incorporated.

Record, pages 10, 11.

The Supreme Judicial Court of Massachusetts has held the interests of Mrs. Saltonstall and Lawrence Brooks to be taxable under the statutes in question. Its opinion and the final decree entered in accordance with that opinion are a part of the Record (see pp. 29–37).

These two respondents have sued out this Writ of Error.

TABLE OF DATES

April 3, 1905	Original Indenture of Trust executed.
April 10, 1905	Supplemental Indenture conveying additional cash.
July 1, 1905	Supplemental Indenture conveying additional cash.
Jan. 6, 1906	Trust Indenture amended by providing that the Trustees might in their discretion apply Lawrence Brooks' share of the income to his maintenance, pay it to his guardians or accumulate it.
Nov. 23, 1906	Supplemental Indenture conveying additional securities.
June 24, 1907	Supplemental Indenture conveying additional securities.
June 27, 1907	Taxing act of 1907 becomes a law.
Sept. 1, 1907	Taxing act of 1907 becomes effective.
March 15, 1909	Trust terminated as to part of property by conveyance of stock in a foreign corporation.
May 1911	Shares of Marquette Safety Deposit Co. exchanged for shares in the Marquette Trust.
July 13, 1915	Sarah L. Brooks died.
April 3, 1905 to June 1, 1917	Payments from income made to Peter C. Brooks.
June 1, 1917 to Jan. 27, 1920	Entire income accumulated.
Oct. 24, 1919	Trust Indenture amended by providing that during the life of Peter C. Brooks the entire income should be accumulated and added to the principal.
Jan. 27, 1920	Peter C. Brooks died.

SUMMARY OF THE ARGUMENT

This taxing Act, interpreted as imposing an excise upon the mere enjoyment or possession—or coming into enjoyment or possession—of property or rights vested in ownership long before its enactment, is beyond the power of the legislature of Massachusetts.

Such a tax is forbidden by the Constitution of the United States, as being—

A taking of property "without due process of law," because it is either (1) an unreasonable, arbitrary and capricious excise, or (2) an unlawful property tax;

Legislation by a state denying to persons within its jurisdiction "the equal protection of the laws";

A law "impairing the Obligation of a Contract";

Legislation which, as interpreted by the Massachusetts court, is an attempt to impose a tax where there is nothing taxable over which the state has jurisdiction.

ARGUMENT

The general question presented by the Petition may be divided into two more specific questions:

A. HAS THE LEGISLATURE OF MASSACHUSETTS UNDERTAKEN TO IMPOSE ANY TAX UPON THE TRANSFER OF THE INTERESTS OF MRS. SALTONSTALL AND LAWRENCE BROOKS?

B. IF SO, HAD THE LEGISLATURE OF MASSACHUSETTS THE POWER TO IMPOSE SUCH A TAX?

These respondents maintained that both of these questions should be answered in the negative (Answer, Record, pp. 26, 27).

The Supreme Judicial Court of Massachusetts has answered both in the affirmative (see Opinion, Record, pp. 30, 38).

The first question is purely one of Massachusetts law, of the interpretation and effect of Massachusetts statutes, and the decision of the Massachusetts court upon it is final and binding, and cannot be reviewed here.

The second question is, in so far as it concerns the interpretation and effect of provisions of the Massachusetts Constitution, also one of Massachusetts law, and, in so far as it concerns the interpretation and effect of provisions of the federal Constitution, it is a federal question.

The decision of the Massachusetts court upon the question of Massachusetts law, relating to the provisions of the Massachusetts Constitution, is final and binding.

The federal question is now to be discussed.

THE LEGISLATURE OF MASSACHUSETTS HAD NO POWER TO IMPOSE SUCH A TAX.

I.

THESE TAXING ACTS, AS INTERPRETED BY THE MASSACHUSETTS COURT, AND THE TAXES THEY IMPOSE, DEPRIVE THESE RESPONDENTS, PLAINTIFFS-IN-ERROR, OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Supreme Judicial Court of Massachusetts has held that "it is the plain import of these statutes in their collective force and effect to subject to the excise tax the interests of the daughter and son of Mr. Brooks at the time of his death" (Record, p. 34, foot), and the final decree in the case expressly imposes upon Eleanor Saltonstall and Lawrence Brooks an obligation to pay this tax (Record, p. 30).

The tax, having that meaning and effect, is, it is submitted, an unreasonable and arbitrary one.

(*a*) A TAX WHICH RETROACTIVELY IMPOSES A BURDEN UPON RIGHTS ALREADY VESTED, AS THIS ONE DOES, IS NOT A REASONABLE FORM OF EXCISE, BUT AN ARBITRARY ONE.

By the conveyances made in 1905, 1906 and 1907, the Trustees acquired the entire legal interest in the trust property, and these respondents acquired the entire equitable interests in remainder in it of which they are now in actual, physical possession and enjoyment. Conceding that these respondents were, upon the execution of the conveyances, not then in actual, present possession and enjoyment of any income, because of the existence of the particular estates, their *rights* were, nevertheless, then already fully vested, vested as completely as ever they could be.

Plainly, each of them already had, at the time when the statute became effective (September 1, 1907), an equitable life interest in remainder in the trust property.

Both remainders were at that time (September 1, 1907) *vested* interests in the trust property, interests in the original trust property which had vested immediately upon the delivery of the trust deed, and of that property, to the Trustees in 1905, and interests in the additional trust property, later conveyed, which had vested as and when that additional property had been conveyed to the Trustees by the four supplemental indentures of 1905, 1906, and 1907, the last of which (the one made June 24, 1907) had preceded by more than two months the date when the taxing Act of 1907 became effective, and had also preceded its enactment.

A "vested" interest in remainder is one which is always ready, from its beginning to its end, to come into possession the moment the prior estates may determine.

> "A present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally

distinguishes a vested remainder from one that is contingent. In general, the law favors that construction which holds a remainder vested, rather than that which considers it contingent, when the question is difficult."

Shaw, C.J., in *Brown* v. *Lawrence*, 3 Cush. 390, at page 397.

"A vested remainder is one, the owner of which has the present capacity of taking the seisin in case the particular estate were to determine, but no degree of uncertainty as to the remainderman's ever enjoying his remainder will render it contingent, provided he has, by the limitation, a present absolute right to enjoy the estate the instant the prior estate shall determine."

Washburn on Real Property, 6th Ed. (1902), Vol. 2, page 514, par. 1541.

"If an estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine, it is then a *vested remainder* and recognized in law as an estate grantable by deed."

Williams on Real Property, page 253.

"Remainders are either vested or contingent. A remainder is vested when at any time during its continuance it is ready to come into possession, whenever and however the preceding estates determine. A remainder is contingent when, in order for it to come into possession, the fulfilment of some condition precedent, other than the determination of the preceding estate, is necessary."

Gray, "The Rule Against Perpetuities," 1886 Ed., Ch. II, Sec. 9 (p. 5).

These life interests of Mrs. Saltonstall and Lawrence Brooks were at all times ready to come into possession the moment the prior estate of Mr. Brooks (and that of Mrs. Brooks, if she survived him) might determine. They were, therefore,

"vested" interests, which had passed to them, and vested in them, immediately upon the delivery of the trust deed and the trust property in 1905, 1906, and in June, 1907.

In *Welch* v. *Treasurer,* 217 Mass. 348, it was decided that the life interests of the children of Charles W. Loring, created by his trust deed (the substance of which is set forth on p. 349 of the report), interests the same as those of these respondents, were vested in those children by force of that instrument, "even though it was subject to possible defeasance by the joint act of the trustees, Mr. Loring, and during her life, Mrs. Loring."

It is scarcely possible to conceive of an authority more closely in point upon the proposition that these life interests of Mrs. Saltonstall and Lawrence Brooks had passed to them, and vested completely in them, before the Act of 1907 took effect on September 1, 1907.

Besides, it is to be remembered that, by the amendment of October 24, 1919, Peter C. Brooks' rights in the income were terminated, finally and completely. The entire beneficial interest in the trust property was from and after that date in Eleanor Saltonstall and Lawrence Brooks, and the other possible future beneficiaries. There was no right or interest whatever left to pass to them upon Mr. Brooks' death.

The Supreme Judicial Court of Massachusetts has not held that the rights and interests of these two respondents were not vested before September 1, 1907. Its opinion contains no such ruling.

Prior to the year 1907 only *collateral* inheritances were taxed in Massachusetts, and there had been no legislation imposing any tax upon property passing to a husband, wife, or lineal descendant, by will or by descent, or by conveyance made or intended to take effect after the death of the grantor.

In the year 1907 a statute (Acts of 1907, c. 563) was enacted and became effective on September 1 of that year (Sec. 27), which, so far as is important for present purposes, provided, in substance, as follows:

> SECTION 1. All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth, or not, which shall pass by will or by the law regulating intestate succession, or by deed, grant, or gift, . . . made or intended to take effect in possession or enjoyment after the death of the grantor to any person, absolutely or in trust, . . . shall be subject to a tax of 5% of its value, for the use of the Commonwealth.
>
> SECTION 7. Any person or persons entitled to a future interest, or to future interests, in any property, may pay the tax on account of the same at any time before such tax would be due . . . and in such cases the tax shall be assessed upon the actual value of the interest at the time of the payment of the tax.
>
> SECTION 25. This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale or gift made prior to said date; but said estates and property shall remain subject to the provisions of the laws in force prior to the passage of this act.
>
> SECTION 27. This act shall take effect on the first day of September in the year 1907.
>
> APPROVED: June 27, 1907.

This act, subject to certain changes in the rates of taxation, in the exemptions, and relating to interests coming into existence as a result of survivorship, has remained in force and, as amended and modified by later legislation, represents the law of the Commonwealth as it existed on January 27, 1920, the date of the death of Peter C. Brooks. (For all the statutes in full, see Appendix.)

All the conveyances mentioned above took place prior to September 1, 1907, the date when the first tax on direct inheritances became effective. Long before that date these

Trustees and these respondents (Mrs. Saltonstall and Lawrence Brooks) had present vested rights to receive certain property upon the death of certain persons. These taxing acts, as construed by the Massachusetts courts, now deprive them of their right to receive some of that property, namely, the amount held to be payable as a tax.

They are deprived of that right on the ground that the state can impose an excise tax for its aid and sanction in making such a transfer valid.

See *Keeney* v. *New York,* 222 U. S. 525, 533.

But if that aid had already been freely given, without being subject to an excise, or any other tax, at the time when the grantor and grantees, relying upon the law as it then existed, entered into the transaction, for the legislature years afterward to attempt retroactively to exact an excise for this "commodity" seems as unreasonable (and, therefore, as unconstitutional) as the action of the Florida Legislature in the case of *Forbes Power Boat Line* v. *Board of Commissioners,* 258 U. S. 338, where Mr. Justice Holmes said (at p. 339):

> "For if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls."

In *Keeney* v. *New York,* supra, the taxing act became law in 1896 and the transaction sought to be taxed took place seven years later, in 1903 (pp. 525, 527). That presents a very different case from ours.

Moreover, in *Keeney* v. *New York,* the grantor "had reserved the right to revoke or alter the whole or any part of the trust conveyance at any time" (p. 526).

Where the legislatures of other states have attempted this

same sort of thing, the courts of those states have had no hesitation in declaring such action unreasonable and beyond their powers. The weight of authority is clear to that effect.

Matter of Fell, 171 N. Y. 48, 55.
Matter of Lyon, 233 N. Y. 208, 212.
Matter of Seaman, 147 N. Y. 69.
Matter of Lansing, 182 N. Y. 238, 247, 248.
Houston's Estate, 276 Pa. 330.
Hunt v. *Wicht,* 174 Cal. 205.
Commonwealth v. *Wellford,* 114 Va. 372.
Commonwealth v. *McCauley's Exor.,* 166 Ky. 450.
State v. *Probate Court,* 102 Minn. 268.
Miller v. *McLaughlin,* 141 Mich. 425, 432.

The Supreme Judicial Court of Massachusetts disposes of the New York authorities just cited by simply saying that they "have not commanded assent in this court" (Record, p. 35) and does not mention the other authorities at all. It is, of course, for that court to say what the meaning and effect of the Massachusetts legislation are; but, if that court so construes these statutes that their purpose and effect are to impose an excise which is unreasonable or arbitrary, then it is open to this court to declare those statutes unconstitutional. In *Levy* v. *Wardell,* 258 U. S. 542, the Collector of Internal Revenue for the District of California attempted to construe the Act of September 8, 1916, as being applicable to a conveyance like that in the case at bar, made before the passage of the Act; and this court said (at p. 544):

> "At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The Act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation

of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment, and would not be, besides, a transfer tax or an indirect tax, but would be a direct tax thereon in violation of Article I, Sec. 9, subdivision 4 of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided."

The entire transaction which these statutes, as construed by the Massachusetts court, purport to tax is before the court on this record, and, there being no finding of fact as to the time when these transfers were intended to take effect in possession and enjoyment, it is submitted that it is open to this court to say that the purpose of this legislation was not sufficiently different from that of the taxing act under consideration in *Levy* v. *Wardell*, supra, to make the reasoning of the latter case inapplicable.

In *Nichols* v. *Coolidge et al.*, 47 Supreme Court Reporter, page 710, the statute which, in *Levy* v. *Wardell*, supra, had been open to two constructions, had been made, by amendment, definitely retroactive (Act, February 24, 1919, Section 402 (*c*)), and this court, consistently with its former opinion, held it unconstitutional. The precise point upon which the decision turned was that it was arbitrary, whimsical, and burdensome to make the *amount* of an excise, not in itself unlawful, "depend upon past lawful transactions, not testamentary in character and beyond recall." Now the Massachusetts statutes do not exhibit that particular form of whimsicality—they do not rely on any indirection about the "amount" of the tax, but, as now construed, tax directly "past lawful transactions, not testamentary in character and beyond recall," and exact an excise upon them. Can it be said that that is a difference which makes the Massachusetts tax any the less objectionable? In speaking of the federal statute, Mr. Justice McReynolds said in *Nichols* v. *Coolidge*, supra (at p. 713):

> "The mere desire to equalize taxation cannot justify a burden on something not within Congressional power."

In another place he says:

> "But under the mere guise of reaching something within its powers, Congress may not lay a charge upon what is beyond them. Taxes are very real things, and statutes imposing them are estimated by practical results" (p. 713).

In both these quotations, the objection to the indirect method adopted by the law-making body is based on the assumption that the object to be attained would be obviously beyond the power of that body if the statute approached it directly—which is just what the Massachusetts statute does.

After this brief had been prepared and its form and arrangement determined, and when the requirements of the rule as to time did not admit of its being rewritten, there appeared the decision of this court in *John W. Blodgett* v. *Charles Holden, Collector of Internal Revenue,* No. 154, decided on November 21, 1927, and not yet in print in any book or report.

In that case the Circuit Court of Appeals for the Sixth Circuit had certified to this court the following question:

> "Are the provisions of Secs. 319–324 of the Revenue Act of 1924, c. 234, 43 Stat. 313, unconstitutional in so far as they impose and levy a tax upon transfers of property by gifts *inter vivos,* not made in contemplation of death, and made prior to June 2, 1924, on which date the Act was approved, because the same is a direct tax and unapportioned, or because it takes property without due process, or for public use without just compensation, in violation of the Fifth Amendment?"

This court, in its opinion, states that in *Nichols* v. *Coolidge* it had "pointed out that a statute purporting to lay a tax may

be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law, within the inhibition of the Fifth Amendment," and then proceeds as follows:

> "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing. . . . So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment. And the question is so answered."

It is submitted that this case, taken in connection with *Nichols* v. *Coolidge*, cited above, is conclusive of the present case.

The Federal Revenue Act, which this decision holds to be unconstitutional as applied to prior transfers, is, like the Massachusetts act, as construed by the Massachusetts court, one which imposes a tax, not upon the property, but "upon transfers."

These gifts made by Mr. Brooks were "absolute," and, so far as he was concerned, irrevocable, because they could not be modified, except with the consent of one of the Trustees.

His gifts were made much longer before the enactment of the taxing act than was the gift in *Blodgett* v. *Holden*.

If "so far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment" and is, therefore, beyond the power of Congress, then, so far as these Massachusetts acts undertake "to impose a tax because of the gifts made" years before they were enacted, they, too, are "arbitrary and invalid under the due process clause of the (Fourteenth) Amendment," and beyond the power of the Massachusetts Legislature.

The Massachusetts tax, whether it be an excise upon the transfer, upon the privilege of giving or of receiving, or even upon the mere privilege of coming into enjoyment or possession—if such a thing there be as distinguished from the property right—is in any case certainly a tax "because of the gifts made" before the enactment of the taxing acts, and so within the very words of this opinion in *Blodgett* v. *Holden*.

Surely a taxing act which is so arbitrary and so unreasonable as to amount to confiscation and a denial of due process, and to be, therefore, beyond the power of Congress, must also be so arbitrary and unreasonable as to be beyond the power of any state legislature.

That the Act may be called an excise is plainly of no consequence, if it is, in substance, a property tax.

> "Neither state courts nor legislatures by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect."
>
> *Choctaw & Gulf R.R.* v. *Harrison*, 235 U. S. 292 (at p. 298).

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidence."
>
> *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. (at p. 292).

> "If it be true that, by varying the form, the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has

indeed been established by repeated decisions of this court."

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (at p. 581).

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288, 289, 292–94.

"Taxes are very real things, and statutes imposing them are estimated by practical results."

Nichols v. *Coolidge*, supra.

(*b*) EVEN IF, BY DOING VIOLENCE TO THE LANGUAGE OF THE STATUTE (WHICH SAYS—"ALL *property* . . . WHICH SHALL PASS . . . BY DEED, GRANT OR GIFT . . . SHALL BE SUBJECT TO A TAX"), IT CAN BE HELD THAT THE TAX IS NOT ON PROPERTY, BUT ON THAT SHADOWY CONCEPTION "THE VESTING OF THE PROPERTY IN POSSESSION AND ENJOYMENT" (Record, p. 36), CALLED A "COMMODITY," STILL THE TAX CANNOT BE SUPPORTED AS AN EXCISE, FOR TWO REASONS:

(1) It would be the same sort of proceeding which was held unreasonable in *Frick* v. *Pennsylvania*, 268 U. S. 473, and in *Nichols* v. *Coolidge*, supra—because "it would open the way for easily doing indirectly what is forbidden to be done directly" (p. 494).

(2) The definitions of the term "excise," which are collected in *Patton* v. *Brady*, 184 U. S. 608, are all similar to Blackstone's, there quoted, which is,

> "an inland imposition, paid sometimes upon the consumption of the commodity. . . ."

In most of them the term "commodity" is the only one which could possibly cover the subject matter of a tax like the one under discussion, and it is the contention of these respondents that nothing which first came to them after the effective date of the original statute (if anything did so come) can reasonably be included in that term. They contend that, as was said in *Scholey* v. *Rew*, 23 Wall. 231,

> "the subject matter of the assessment is the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy"—

and that this devolution or right had become complete when the original transfers were made. As has been pointed out before (*supra*, pp. 19–21), Mrs. Saltonstall and Lawrence Brooks had acquired in 1905, 1906, and 1907 vested interests in remainder in the trust property, interests always

ready to come into possession the moment the prior estates might determine. They acquired *at that time* the right not only to the property, but also to immediate possession and enjoyment upon the death of Mr. Brooks; and, after that, the only thing left for the state to tax was the actual use and enjoyment of their own property—of what already belonged to them. Such a tax would be, like a tax upon the income from property,—a direct tax on the property itself.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, and 158 U. S. 601.

> "Nor can it be successfully argued that the tax is not on the transfer of title to the property, but on the transfer of enjoyment, for, as it seems to us, the act means by this the right of enjoyment, and this was vested under the deed. If the tax is imposed when enjoyment is perfected by actual possession, and this theory is carried to its logical conclusion, it would seem that if, during the administration of an estate, delays occur, as they necessarily must, and if, before actual distribution is made, the rate of taxation is changed, a legacy would be taxed at the changed rate, which would appear to be a *reductio ad absurdum*."
>
> *Houston's Estate*, 276 Pa. 330.

But the Supreme Judicial Court has said in this case that the tax is an excise (Record, p. 34), and in earlier cases that it is invalid if a tax on property.

Minot v. *Winthrop*, 162 Mass. 133.

The state can recognize legal or equitable rights to all kinds of property, and can lend its aid in creating them and enforcing them. It can also, presumably, exact an excise for its aid and sanction in so doing. But can it, under the guise of an excise, exact a tax for the mere physical posses-

sion or enjoyment of one's own property when this is nothing but the exercise of a right which the state had already given long before? The answer to this question is excellently expressed in the words of Hough, Circuit Judge, in *Frew* v. *Bowers,* 12 Federal (2d) 625 (at p. 627):

> "But further, what is meant by the phrase 'take effect in possession or enjoyment at or after' the death of the trust creator? The natural inclination of every lawyer is to recognize that 'take effect' is not a phrase of art, to search for some artistic equivalent, and find it in the word 'vest.' But if, as the result of a passage of title, the passing estate is vested, whether in fee, for life, in remainder, or in reversion, even though subject to divestment by subsequent event, then the transfer is complete, and so is the 'possession or enjoyment,' for one 'possesses and enjoys' a reversion as thoroughly as he does a fee, even though most men prefer a fee to a reversion.
>
> "But if the transfer of an estate results in the immediate vesting thereof, and of each and every part of the same, the transaction is complete, and the grantor or transferor has no 'interest' left therein; wherefore on his death there can be found no such 'interest' to include in his gross estate."

This case, again, dealt with the Federal Estate Tax, but if, for the phrase "to include in his gross estate," there be substituted "upon the accrual of which the state can base an excise," the quotation becomes a clear exposition of the point urged in the case at bar.

This tax has always been sustained by the Massachusetts court, and can be sustained, only as an excise upon the privilege of transferring or acquiring, *by will or deed,* the right or title to property, or to an interest therein—the "right of succession," as some courts have called it—not the transfer of "possession" or "enjoyment" by will or deed. One person cannot, by a will or a deed, transfer "enjoy-

ment" or "possession" to another. Deeds and wills deal with, and "pass" and convey, rights—legal rights, not physical conditions. "Enjoyment" and "possession" are physical conditions which may, or may not, accompany ownership or a right conveyed by deed or will. The actual enjoyment and possession of property pass usually by delivery in the case of personal property, by livery of seisin in the case of realty—or, at times, by force or violence—but not by deed or by will. Deeds and wills convey the abstract legal right to enjoy and possess, and only that. Actual enjoyment or possession may, or may not, follow that right. Persons who have a perfect right to possess and enjoy immediately, or in the future, may never possess or enjoy in fact. Death, the destruction or misappropriation of the property, or many other vicissitudes, may well prevent actual possession or enjoyment. Conversely, persons often have possession and enjoyment entirely without right.

Could it possibly be maintained that one who inherited valuable property taxable under the Act could escape payment of the tax upon it so long as he was prevented from coming into the actual possession or enjoyment of it by a trespasser or disseisor?

In this connection it is interesting to note, and to consider, that the Massachusetts court itself has four times—in no less than four of its very recent decisions—expressly held, and stated in terms, that this excise is a tax, not on "possession" or "enjoyment," or "coming into possession and enjoyment," but upon the *right* to receive *property,* "the privilege of passing *title.*"

> "Under our own Constitution, the 'commodity' which may be taxed, in the absence of corporeal jurisdiction over the property itself, is the privilege of passing *title* under the sanction and protection of our law."
>
> *Walker* v. *Treasurer and Receiver General,* 221 Mass. 600 (at p. 602).

Here is an express statement that it is the privilege of *"passing title,"* not possession or enjoyment, which is taxed.

> "The tax is imposed, not upon the property, but upon the right to receive *property,* by reason of the death of the testator or donor. It is not a property tax, but an excise upon the transmission of property."
>
> Rugg, C. J., in *Pratt* v. *Dean,* 246 Mass. 300 (at p. 308).

Here is a plain statement that it is upon the *right* to receive or transmit property, not upon the possession or enjoyment of it, that the "tax is imposed."

> "It is the privilege of disposing of *property* after the death of the grantor or testator and of succeeding to it which is taxed."
>
> *Dexter* v. *Treasurer,* 243 Mass. 523 (at p. 525, foot).

This case holds in terms that it is the privilege of disposing of *property,* and of succeeding to property—not succeeding to possession or enjoyment—which is taxed.

In *Attorney General* v. *Barney,* 211 Mass. 134 (at p. 137), the opinion of the court contains this language:

> "The principle on which the legacy and succession tax is based, which is, that it is 'an excise tax upon the privilege of passing *title to property* on the death of its owner.' *Kingsbury* v. *Chapin,* 196 Mass. 533, 537."
>
> (Italics above ours.)

Here, again, is the definite statement that the tax is laid upon the privilege of passing *title to property.*

(*c*) THIS TAX CANNOT BE JUSTIFIED UPON THE GROUND THAT IT IS NECESSARY TO INCLUDE THESE AND SIMILAR INTERESTS IN ORDER TO PREVENT EVASION.

Mr. Brooks made a complete disposition of this property, *inter vivos,* more than two years before the enactment of any Massachusetts statute taxing either a transfer of this kind, *or of any kind,* made for the benefit of lineal descendants. It is to be presumed that any reasonable man disposing, as he was, of valuable property, weighed the results of such a step, and then adopted what appeared, under the existing law and circumstances, the wisest course. At that time there appeared no reason why he should not make a present disposition of his property, irrevocable so far as he himself was concerned, for the ultimate benefit of his wife and children at a time when he would no longer be himself able to care for their interests. It may not be helpful to speculate as to his reasons for adopting such a course in preference to disposing of his property by will, or making an absolute gift of it outright, but it is to be assumed that they were not based upon mere whim, and that the provisions of law which might affect the various possible modes of transfer were given consideration. He had, when he made this settlement, no reason to believe that any other method of disposition would be taxed. He was merely availing himself—for reasons wholly unconnected with taxation—of one of the methods of exercising a right which—as given by the common law in the case of deeds, or by the legislature in the case of wills—was given to the citizen free of any tax.

While the court in *Nichols* v. *Coolidge,* supra, said that, as there was no claim that the transfers in that case were made in contemplation of death or with purpose to evade taxation, the extent of Congressional power to prevent evasion did not need to be discussed. It did say after that:—

"Undoubtedly, Congress may require that property

> subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted powers, *but the right is limited by the necessity.*" (Italics ours.)

It cannot, and undoubtedly will not, be seriously maintained that the retroactive feature of this tax is founded upon any necessity of preventing evasion.

(*d*) AMONG THE REQUIRED ATTRIBUTES OF AN EXCISE THAT IS REASONABLE IS SOME POWER OF CHOICE IN THE PERSON, OF CHOOSING WHETHER HE WILL AVAIL HIMSELF OF THE "COMMODITY" TAXED, AND SO PAY THE EXCISE, OR REMAIN EXEMPT FROM THE EXCISE BY FOREGOING THE "COMMODITY."

Otherwise an intolerable condition would result, for where the commodity comes to a person who has little or no other property, he must perforce pay the tax from that commodity or its proceeds. In the case of a legacy the practical point of view of the recipient is that he will receive so much, *less the amount of the tax.* But if, relying on a state of the law where no tax is exacted, he accepts the legacy, or enters into obligations on the basis of his vested right to receive it, and then, years later, is told that he must pay to the state a substantial sum, his position, unless he have independent property, is not an enviable one. True, there are cases arising under wills, or even transfers *inter vivos*, where the recipient has been compelled to pay, but the reluctance of courts to require this, and their frequent references to "change of position," show plainly that they would not regard as reasonable legislation which would make such cases more common.

As this has been held to be a tax upon the right of *these respondents to receive* the property, it is probably not open to us here to consider the feelings of Mr. Brooks, or any other grantor in his position, if he could know how his plans for the future welfare of his wife and children, carefully made on the basis of the law as it stood at the time of putting them into effect, have been affected by legislation enacted after it was beyond his power alone to change them. It is, however, pertinent to consider at least the position of these respondents, who, from the time the transfers were made in 1905, 1906, and 1907, have believed themselves entitled to receive eventually all the property to which they then acquired a vested right. Their interest could be di-

vested upon certain conditions, but these conditions were known, and they could estimate the possibility of their happening and govern themselves accordingly. They accepted the provisions made by Mr. Brooks for their benefit, some of the fruits of which accrued immediately and some at different times in the future, but all of which were certain (except for the conditions above mentioned) to accrue at some time. They planned their activities and their mode of living accordingly, and now, having thus changed their position, they have no choice but to relinquish a substantial part of their property to the state in the form of an excise. Can it make this any less objectionable, from a practical point of view, to say that the excise is laid on a certain indefinite something called "vesting in possession and enjoyment," although, as has been pointed out above, this Massachusetts court itself has recently held, and clearly stated, no less than four times, that it is laid upon the *right* to receive *property*, to acquire *title* to property?

See, *Le Feber* v. *Wilkinson*, U. S. Dist. Ct., E. D. Wisconsin, Nov. 22, 1926.

In the language of the recent opinion in *Nichols* v. *Coolidge*, supra,

> "Taxes are very real things and statutes imposing them are estimated by practical results."

(*c*) IN ANY EVENT, MASSACHUSETTS HAS NO RIGHT OR POWER TO IMPOSE THE TAX, BECAUSE IT IS NOT THE STATE FROM WHICH IS DERIVED THE PRIVILEGE BY VIRTUE OF WHICH THIS PROPERTY, OR AN INTEREST IN THIS PROPERTY, WAS ACQUIRED.

The privilege of passing or acquiring title by force of, or under the sanction of, Massachusetts laws is, according to the long-established doctrine of the Massachusetts court, the "commodity" upon which this "excise" is laid. There is no other basis or justification for such a tax.

See *Minot* v. *Winthrop*, 162 Mass. 133.

Besides, it is only "all *property within the jurisdiction of the Commonwealth* . . ." transfers of which the statute purports to tax, or can tax.

The interests of these respondents were not acquired under the sanction of our laws, and the property transferred was not within the jurisdiction of Massachusetts.

The interests in property transferred to these respondents which it is sought to tax were equitable interests in—

(1) Shares of stock in an Illinois corporation (the Marquette Safety Deposit Co.).
(2) Shares of stock in other foreign corporations.
(3) Cash.
(4) Shares in the Chicago Real Estate Trust, a voluntary association owning real estate in Chicago, an Illinois mortgage, cash and securities.

Petition, paragraphs 4, 15.

(1) The Shares of Stock in the Marquette Safety Deposit Co., an Illinois corporation.

These were shares of stock in a foreign corporation. Perhaps Massachusetts might by statute have treated the certifi-

cates of stock as being themselves property passing from hand to hand, like a negotiable bond, and so have taxed a physical transfer of these certificates made in Massachusetts, even though the corporation were domiciled elsewhere.

But this Massachusetts has not done. Under its decisions shares of stock in foreign corporations owned by nonresident decedents are not property "found" in Massachusetts, nor subject to the inheritance tax, even when the certificates are physically within the Commonwealth.

Clark v. *Treasurer,* 218 Mass. 292.
Kennedy v. *Hodges,* 215 Mass. 112, 114.

Even if our law were to the contrary, Massachusetts could scarcely by statute enacted June 27, 1907, and effective September 1, 1907, impose a tax on transfers of such certificates made in 1905, 1906 and on June 24, 1907, long before the taxing act came into existence.

The only other possible warrant for a tax upon the interests of these respondents would be that the transfers had become effective by virtue of Massachusetts law, or of some right or privilege derived from Massachusetts, upon which, as being a "commodity," an excise could properly be laid.

Here this was not the case. The stock certificates were, of course, transferred to the Trustees on the books at the domicile of the Illinois corporation, and, wherever that transfer may have taken place, it took effect by virtue and by force of the law of Illinois, the state which created the corporation and fixed the conditions under which shares of its capital stock could, and should, be transferred.

When title to those shares has, by virtue of the law of Illinois, been completely vested in the three Petitioners as trustees for, and in trust for, these beneficiaries, there is then no legal basis for an excise tax by Massachusetts upon the right, or privilege, of the beneficiaries to acquire their interests and receive the income from the shares. Their right to

receive that income accrued when, by virtue of the Illinois law, the shares were transferred by the officers of the corporation to the Petitioners in trust for them. There remained no occasion for the operation of any Massachusetts law and so no legal basis for the imposition by Massachusetts of any excise.

The subsequent exchange of these shares for shares in the Marquette Real Estate Trust can be of no consequence. The fact that the Trustees in 1911 surrendered the shares in the corporation in exchange for shares in the Trust—the title to which was also acquired by them by means of a transfer in Illinois—does not change the situation. Inasmuch as the original transfer by Peter C. Brooks was not taxable, because not a transfer of property within the jurisdiction of Massachusetts, nor made by virtue of Massachusetts law, there can be no legal basis for taxing the possession or enjoyment of the income of the reinvestments. Peter C. Brooks never transferred, never even owned, the shares in the Marquette Real Estate Trust.

If, however, the character of shares in the Marquette Real Estate Trust be of any consequence, then they consisted of interests in a leasehold, and in certain personal property in Chicago. A leasehold is, of course, an immovable, and a transfer of it *inter vivos* depends upon, and is governed by, the law of the *situs* of the leasehold property, whether real or personal. This is necessarily so, for reasons not only legal, but physical, because the property is within the power and control of the sovereignty in whose territory it is.

A leasehold, being immovable, passes by the law of the *situs*, and the authorities are to that effect.

Peppin v. *Bruyere* (1902), 1 Ch. 24.
Goods of Gentili, 9 I. R. Eq. 541.
Wharton: Conflict of Laws (3d Ed.), Sec. 576D.
Beale: Jurisdiction to Tax, 32 Harvard Law Review, 625.

Sneed v. *Erving*, 5 J. J. Marsh (Ky.) 459, 476–478.
2 L. R. A. (N.S.) 410–413.

No Illinois decision upon the point has been found.

(2) The Shares of Stock in other Foreign Corporations.

To these the same considerations apply as do to the shares of the Illinois corporation. They passed by virtue of the laws of the several states by which they were created, not, in any proper sense, under, or by force or virtue of, or "under the sanction of," or by operation of, Massachusetts law.

(3) The Cash.

Perhaps this cannot properly be said to have passed by virtue of any particular law, but merely by delivery. Once physically handed over, perhaps it would have passed effectively in an uncivilized place where there was no law.

However that may be, the amount of cash on September 1, 1907, was so small as to make the tax upon it practically negligible.

Petition, paragraph 4.

The subsequent exchange of some of the shares in foreign corporations and associations, for cash, making the amount of cash and negotiable securities on hand in 1920 considerably larger, can be of no consequence. The subsequently acquired cash and securities were never transferred by Peter C. Brooks, and had never belonged to him. No transfer of them had ever been made by virtue of Massachusetts law, and there could be no legal basis for taxing the possession or enjoyment of the income of these subsequently acquired assets of the Trust.

(4) The Shares in the Chicago Real Estate Trust.

These were, of course, either interests in personal property—securities and cash—or in the real estate in Illinois

owned by that Trust. The Trust was organized and managed in Illinois.

Petition, paragraph 15; Record, page 13.

The single justice has expressly found that, according to the law of Illinois, the interest of a certificate holder in the Chicago Real Estate Trust is personalty.

Record, page 3.

It is definitely settled that a shareholder's interest in these business "trusts" is not a mere *chose in action*, but a "substantial equitable property right" in the specific property held by the trustees.

Peabody v. *Treasurer*, 215 Mass. 129, 131.
Bartlett v. *Gill*, 221 Fed. 476.
Dana v. *Treasurer*, 227 Mass. 562, 572, 573.

Shares in a Massachusetts real estate trust held by non-residents are held to be property within the jurisdiction of the Commonwealth for the purposes of the inheritance tax.

Priestly v. *Treasurer*, 230 Mass. 452.
Peabody v. *Treasurer*, 215 Mass. 129, 131.
Kenney v. *Treasurer*, 207 Mass. 368, 371.

Accordingly, shares in an Illinois real estate trust held by a resident of Massachusetts must be, according to Massachusetts law, property within the jurisdiction of Illinois, and not of Massachusetts, for the purposes of such a tax.

The transfer of these shares made by Mr. Brooks to the Trustees in 1907, when the respondents' rights in them vested, was, of course, a transfer *inter vivos*, not by will or by intestacy.

Now, all transfers of *immovable* property, and of *tangible* personal property, depend upon, and are governed by, the law of the *situs* of that property, whether real or personal.

This is necessarily so for reasons not only legal, but physical, because the property is within the power and control of the sovereignty in whose territory it is.

All transfers of *all* personal property *inter vivos* depend upon, and are governed by the law of the *situs* of the property at the time of the transfer.

> "It was decided by this court in *Green* v. *Van Buskirk*, 5 Wall. 137, 7 Id. 139, that the liability of property to be sold under legal process, issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawfully in that jurisdiction, respected in the courts of the state where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter state conflict with those of the former."
>
> *Hervey et al.* v. *R. I. Locomotive Works*, 93 U. S. 664 (1876) (p. 671).

> "We think the case was tried by counsel upon an erroneous theory. The title to tangible personal property is ordinarily governed by the law of its situs. The maxim *mobilia personam sequuntur* states mere fiction of law, which it is sometimes necessary to apply in order to do justice, but it ought not to be extended beyond that necessity. Our Supreme Court long ago recognized the absurdity of affirming that goods found within the jurisdiction of the state are not subject to its laws. . . ."
>
> *Schmidt* v. *Perkins*, 74 N. J. L. 785 (at p. 786).

> ". . . the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the state of its situs, and that the laws of other states have no bearing

save as that state expressly or tacitly adopts them—their bearing then being attributable to such adoption and not to any force of their own."

Frick v. *Commonwealth of Pennsylvania*, 268 U. S. 473 (at page 491).

"A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property."

Story, Conflict of Laws, Section 550.

"The validity of a gift *causa mortis* is determined by the law of the place where it is made, without reference to the domicile of the owner."

O'Neil v. *O'Neil*, 43 Montana 505 (at p. 516).

To the same effect are—

Green v. *Van Buskirk*, 5 Wall. 137; 7 Wall. 139.
Masury v. *Arkansas National Bank*, 87 Fed. 381.
Emery v. *Clough*, 63 N. H. 552.
Keller v. *Paine*, 107 N. Y. 83.
Dearing v. *McKinnon Co.*, 33 App. Div. 31.
Dooley v. *Pease*, 180 U. S. 126.
Southern Hardware & Supply Co v. *Clark*, 201 Fed. 1.
In re Korvine's Trust (1921), 1 Ch. 343.
Van Grutten v. Digby, 31 Beav. 561.

So the creation of trusts in personal property by means of a settlement *inter vivos* depends upon the law of the *situs* of the personal property at the time of the transfer.

Beale: Equitable Interests in Foreign Property, 20 Harvard Law Review, 382–394.

Of course, the transfer of an interest in real property and the creation of a trust in real property depend upon the law of the *situs* of the real property.

Inasmuch, therefore, as the transfer of shares in the Chicago Real Estate Trust was a transfer *inter vivos* of interests in personalty and in realty, both being in Illinois, it was necessarily governed entirely by Illinois law, and did not depend in any degree for its efficacy upon the law of Massachusetts.

The power of a state to tax is necessarily limited to property and subjects within its jurisdiction.

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."
>
> Field, J., in *State Tax on Foreign-held Bonds,* 15 Wall. 300, 319 (1873).

> "It is elementary that the taxing power of one government cannot be lawfully exerted over property not within its jurisdiction or territory and within the territory and jurisdiction of another."
>
> White, J. (dissenting) in *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 230 (1897).

> "To impose either tax the state must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law."
>
> Van Devanter, J., in *Frick* v. *Commonwealth of Pennsylvania,* 268 U. S. 473 (at page 492).

Every state is forbidden by the Fourteenth Amendment to the Constitution of the United States to impose taxes outside its own jurisdiction to do so.

> "Property situated without that jurisdiction is beyond the State's taxing power, and the exaction of a

tax upon it is in violation of the Fourteenth Amendment to the Constitution."

Moody, J. in *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395, 399 (1907).

"The exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment."

Van Devanter, J., in *Frick* v. *Commonwealth,* 45 Sup. Ct. Rep. 603, 604 (1925).

In order that a state may have power and jurisdiction to impose a tax upon the right to transfer and acquire, the law of that state must effectuate (or at least co-operate in effectuating) the transfer taxed.

"If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax."

Holmes, J. in *Blackstone* v. *Miller,* 188 U. S. 189, 205 (1903).

"That transfers of this nature are within the taxing power of the State, and that taxes may be assessed upon such rights owing their existence to local laws, and to them alone, is not disputed."

Day, J., in *Maxwell* v. *Bugbee,* 250 U. S. 525 (1919).

The only state, therefore, that has power or jurisdiction to tax a transfer *inter vivos* is, in the case of tangible property, the state of its *situs* or, in the case of intangible property, the state whose law effectuates the transfer of it.

"When the property is not physically within the jurisdiction of the taxing power, and its complete succession may be accomplished without invoking any privi-

lege or sanction conferred by its laws, then there is nothing to which taxation can attach."

Walker v. *Treasurer,* 221 Mass. 600, 602.

The law of the state of the domicile of the owner is not the law that effectuates a transfer *inter vivos* of any form of personal property, even though the transfer is a gift *causa mortis.* Such transfers depend upon, and are governed by, the law of the state in which the property is at the time when it is transferred.

See *Green* v. *Van Buskirk,* 5 Wall. 137, and other cases cited *supra,* pages 44, 45.

A fortiori, the law of the owner's domicile does not govern the transfer *inter vivos* of a gift of personal property *in praesenti,* the only connection of which with death is that death is a condition of the enjoyment of the interest. The general rule of law according to which the *inheritance* of movables is governed by the law of the decedent's domicile has no application to a gift of personal property made *inter vivos* during the life of the owner, even though it is a gift to become effective only upon his death.

Emery v. *Clough,* and other authorities cited *supra,* page 45.

The transfer of these shares in the Chicago Real Estate Trust, being a transfer *inter vivos,* can be taxed only by the state whose law effectuated the transfer. Such a transfer of shares can be effectuated only:

(*a*) By the transfer of the trustees' certificate.

Massachusetts, however, does not tax the transfer of the physical certificate:

See *Clark* v. *Treasurer,* supra;
Kennedy v. *Hodges,* supra;

or

(*b*) By the law of that state which transfers the interest in the corporation, or association, which is the state in which it is organized.

That state alone can tax the transfer of such an interest.

It is possible that the suggestion may be made (based upon an allegation in the petition in *Dana* v. *Treasurer*, 227 Mass. 562, quoted at page 574) that the fact that a suit for the enforcement of this Trust might have to be brought in the courts of Massachusetts, if the Trustees were here, could furnish some basis for the imposition of this tax by Massachusetts.

There would be no force in any such suggestion, for the following reasons:

The creation of a trust in personal property by conveyance *inter vivos* is accomplished by virtue of the law which passes the title to the property. This, in the case of shares in a corporation, is necessarily the law of the state of its incorporation, and, in the case of shares in a trust in corporate form, of the state where it is organized and managed and where the trust certificates are transferred.

After a trust is once created, the law which applies to its administration is the law of the place where the trust is to be administered.

Any suit for the *enforcement* of the provisions of the trust must be either:

(1) A suit to enforce the conveyance, as by having the shares transferred to the trustee on the books, or by having the trustee declared to hold the shares in trust, either of which suits is properly brought only in the state of incorporation, in the case of a corporation, or in the state of organization and management, where the certificates are transferred, in the case of a trust with transferable shares.

In this case such a suit by a shareholder in the 1905 Trust

should be brought in the states where the shares of the foreign corporations and of the Chicago Real Estate Trust are transferable: or

(2) A suit to enforce the proper performance of the provisions of the trust instrument.

A suit for this latter purpose, in the case of this Trust of 1905, could, indeed, be brought in Massachusetts, if the trustees happened to be found here at the time, but could also, of course, be brought wherever they might be found, or in other states where trust property could be reached and seized; but such a suit would have nothing to do with the creation of the trust or the validity of the transfer creating it, or with the law by force of which the title to the trust property had passed.

See Equitable Interests in Foreign Property, Harvard Law Review, Vol. 20, No. 5, page 382 (at pp. 393–397).

A bill lies at the domicile of a corporation to establish a trust in the stock of that corporation.

Amparo Mining Co. v. *Fidelity Trust Co.*, 75 N. J. Eq. 555; 73 Atl. 249 (1904).

Bouree v. *Trust Français* 127, Atl. Rep. 56 (Delaware Chancery).

Gassert v. *Strong*, 38 Mont. 18; 99 Pac. 497 (1908).

A bill lies in the state of incorporation to determine the ownership of shares, and even to compel the issue of a certificate.

Jellinek v. *Huron Copper Mining Co.*, 177 U. S. 1.

Holmes v. *Camp*, 219 N. Y. 359.

Fahrig v. *Milwaukee Breweries*, 113 Ill. App. 525 (1904).

Gamble v. *Dawson*, 67 Wash. 72; 120 Pac. 1060 (1912).

It may be added that, if the place where suit may be brought to enforce the performance of the provisions of the trust instrument could determine the jurisdiction to tax the creation of, or acquisition of, interests under the trust, it would be equally efficacious for that purpose in the case of a trust created by will. But nothing can be clearer than that an interest under a trust created by will can be taxed only at the domicile of the testator. If, for example, the trustees under a trust created by the will of a Massachusetts testator resided in New York, and could be sued only in that state, that could not possibly give New York the right to tax the transfer in trust effected by the will.

It is submitted that the jurisdiction in which suits may, or should, be brought, to enforce the provisions of this trust deed is a fact of no consequence whatever for the purposes of this tax.

II.

THESE TAXING ACTS, AS INTERPRETED BY THE MASSACHUSETTS COURT, AND THE TAXES THEY IMPOSE, DENY TO THESE RESPONDENTS, PLAINTIFFS IN ERROR, THE EQUAL PROTECTION OF THE LAWS, WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

1. If, though called by the Massachusetts courts an excise, this be in fact a tax upon property (as contended by these respondents), the exemptions and varying rates of taxation, determined not by the size or character of the property, but by considerations attaching to the persons who pay the tax, make its application unequal.

2. Transfers and acquisitions of property, and property rights, effected by means of deeds effective before the enactment of the taxing act are subjected to the tax, whereas transfers and acquisitions of precisely the same property and property rights, when effected by means of wills effective before the enactment of the taxing act, are exempted.

3. If two precisely similar interests, two vested remainders for example, are conveyed by the same instrument, whether deed or will, one to *A* upon the death of *X*, the other to *B* upon the death of *Y*, then *A's* interest is taxed if *X* dies after the enactment of the statute, but *B's* interest is exempted if *Y* died before the enactment of the statute.

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation.
>
> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification

is imposed; and classification cannot be arbitrarily made without any substantial basis."

Southern Railway Co. v. *Greene,* 216 U. S. 400 (at pp. 412, 417), and authorities cited on page 417.

See also:

Matter of Pell, 171 N. Y. 48, 59, 60.

III.

THESE TAXING ACTS, AS INTERPRETED BY THE MASSACHUSETTS COURT, AND THE TAXES THEY IMPOSE, IMPAIR THE OBLIGATION OF A CONTRACT WITHIN THE MEANING OF ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES.

The act, if construed as including these interests, is probably also a violation of Section 10 of Article I of the Constitution of the United States, which prohibits the states from passing any "Law impairing the Obligation of Contracts."

By the terms of the trust deeds, executed by Peter C. Brooks and by the Trustees, these Trustees assumed an obligation, contractual in its nature—in substance, and in the constitutional sense, a contract, an executory contract—to pay the entire income of the trust property, after his death and that of Mrs. Brooks, to, or for the benefit of, Mrs. Saltonstall and Lawrence Brooks during their lives.

> See, *Tyler* v. *Treasurer,* 226 Mass. 306, 308.
>
> "The Nature of the Rights of the *Cestui que Trust,*" by Harlan F. Stone (now Mr. Justice Stone), Columbia Law Review, June, 1917, Vol. XVII, No. 6, page 468.

If a state statute, enacted long after the creation of that contractual obligation and long after the rights of these two beneficiaries in the trust property have vested, now undertakes to require that the trustees shall not pay to them, or accumulate for them, the whole of that income, but shall divert a portion of it to paying a state property tax illegally laid and assessed, then such a statute impairs the obligation of the contract.

"A change of the express stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislature. The Constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. . . . It may, then, safely be affirmed that no State, by virtue of its taxing power, can say to a debtor 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State treasury.'"

Murray v. *Charleston*, 96 U. S. 432, 444.

Fletcher v. *Peck*, 6 Cranch, 87.

State Tax on Foreign-held Bonds, 15 Wall. 300.

Levy v. *Wardell*, 258 U. S. 542.

The case of *Moffitt* v. *Kelly*, 218 U. S. 400, may be cited by the Treasurer, but is clearly distinguishable. This case sustained the constitutionality of a California statute imposing an inheritance tax on succession by a wife to the marital community property on her husband's death.

The decision cannot be understood without referring to the decision of the state court. The case was brought to this court by writ of error to the Supreme Court of California. The decision there is 153 Cal. 359. There the statute was upheld on the ground that, under the California law, upon the death of the husband, the wife took one-half of the community property as heir. No attention was paid to the scope of the Legislature's taxing power; but it is clear that if the wife took one-half the property as heir, there was exactly the same sort of transfer of legal title as in the case of intestacy; and, conceding the correctness of the position of the California court on the question of California property law, the decision in both courts was plainly right. That this was the attitude of the United States Supreme Court is clear from the opinion:

> "To make this, if possible, clearer by an illustration, we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that on an analysis of the constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Moffitts, we should conclude that the nature and character of the rights of the wife in the community property, if correctly interpreted, were such that on the death of the husband the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration. This would be the case, because as there was state power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely state question not involving any violation of the Constitution of the

United States, and which therefore we have no right to review" (p. 405).

Keeney v. *New York*, 222 U. S. 525, which the Treasurer cited and relied upon, differs from our case in two essential features:

(1) The deed of trust was made in 1903 (p. 526), seven years after the taxing Act had taken effect in 1896 (p. 527). The right taxed had not vested until long after the enactment of the tax.

(2) The grantor had "reserved the right to revoke or alter the whole or any part of the trust conveyance, at any time" (p. 526).

Cahen v. *Brewster*, 203 U. S. 543, also cited and relied upon in his brief, below, is plainly distinguishable, and rests upon certain peculiarities of the civil law in force in the State of Louisiana and the view of them taken by the courts of that state. (See pp. 551, 552.) It is, moreover, a case of a tax upon an inheritance under a will by a collateral, not of a gift *inter vivos*.

REPLY TO ARGUMENTS OF TREASURER AND RECEIVER GENERAL

The brief filed in behalf of the Treasurer and Receiver General in the Massachusetts court advanced certain propositions which may now be relied upon in this court. Some of these will now be stated here, and the answer of these respondents to each proposition will be indicated.

I. ELEANOR SALTONSTALL AND LAWRENCE BROOKS TAKE SPENDTHRIFT TRUSTS OF NET INCOME ONLY.

The respondents suggest that this proposition, if true, is irrelevant and immaterial.

It may be admitted that Mrs. Saltonstall and Lawrence Brooks have merely equitable rights to receive the net income of the trust property, and that their interest cannot be disposed of by way of anticipation, or be subjected to the claims of creditors.

The name by which these rights or interests may be designated cannot be of any real importance. The interests, whatever they may be called, were undoubtedly *vested* interests, and had vested in 1905, 1906, and 1907, as and when the trust property was conveyed to the Trustees.

It is further suggested that, if the interests of these respondents—whatever they may be—do not amount to "property," or an "interest therein," then the transfer of them is not taxable at all, because the Act taxes only transfers of "property and any interest therein."

II. BOTH INTERESTS ARE WITHIN THE WORDS OF THE INHERITANCE TAX ACTS.

A. It may be admitted at once that the interest of each of these respondents "took effect in possession or enjoyment

after the death of the grantor or donor," *if by that is meant only that they had no opportunity to actually use or enjoy the income of the trust fund until after the death of Peter C. Brooks.*

The taxing section of the statute, however, imposes no tax upon interests "made or intended to take effect in possession or enjoyment after the death of the grantor." The expression "made or intended to take effect in possession or enjoyment after the death of the grantor" is used in the Act only for the purpose of describing the general class of deeds, or grants, to which the statute is applicable, if other necessary conditions exist. The thing upon which a tax is actually imposed is a transfer of "property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, . . . which *shall* pass by will or by deed, grant or gift" of this general class.

It is true that the Act applies to "property or interests therein passing or accruing upon the death of persons who die subsequently to the passage hereof," but no property or interest passed or accrued to these respondents upon the death of Mr. Brooks. The interests of these respondents had passed and accrued years before then. Neither possession nor enjoyment is "property" or "an interest therein."

B. That the interests of these respondents are "subject to a power of appointment" is denied, except in the sense that they are interests already vested in 1905, which might later have been divested by the joint act of Mr. Brooks and one of the Trustees in altering the trust deed.

See *Towler* v. *Towler,* 142 N. Y. 371 at page 376.

Section 8 of the Act of 1909 applies, and can apply, only to rights and interests dependent for their coming into existence, and for their vesting, upon the exercise, or failure to exercise, a power, not to such rights and interests as

being already vested, are merely subject to a possibility of being divested by the exercise of a power. If Mr. Brooks failed to exercise this so-called "power," these respondents would not be persons "*thereby* becoming *entitled* to the possession or enjoyment of the property to which such power related" within the meaning of Acts of 1909, Chapter 527, Section 8. They would be persons who were already entitled to enjoy and possess it upon his death by virtue of the rights vested in them since 1905.

See *Matter of Lansing,* 182 N. Y. 238, 248, 249.

There is, however, another, and a complete, answer to this suggestion in behalf of the Commonwealth; *i.e.* that, assuming that the right to alter or revoke the trust can be treated as a "power," then that power could be exercised only by writings signed by Peter C. Brooks himself and one of the Trustees. Plainly, this would be a power which could be exercised only *before the death* of Mr. Brooks, by some writing signed jointly by him and by one of the Trustees. A disposition made by means of an exercise, or a non-exercise, of it would not be made upon the death of Mr. Brooks, nor would it take effect upon his death, but during his lifetime. The theory upon which the Act taxes a disposition resulting from the exercise, or non-exercise, of a power created earlier is that it takes effect upon death; but here an appointment would, of course, take effect in his lifetime, and a failure to appoint would have no effect—nobody "would *thereby* become entitled." The rights and interests of these respondents would simply remain unchanged, and vested in them, as they had been since 1905. This section is applicable only to interests which vest by reason of the exercise, or non-exercise, of a power—to cases where somebody becomes "*thereby* entitled" to some right or interest. Such is not the present case. These respondents do not derive their right or title from Mr. Brooks' failure to change the trust instrument, if one of the Trustees would join him in doing so.

If this theory of a power, and of the applicability of the Act of 1909 relating to the exercise or non-exercise of powers, were a correct one and available for the purpose of subjecting these interests to the tax, that would have been true in *Dexter* v. *Treasurer,* 243 Mass. 523, and would have necessitated a different result in that case.

Here, as there, "the donor, reserved"—at least after the amendment of 1919—"no beneficial interest in the estate. He did, however, reserve the right to divest the donees of their interest, but he did not see fit to use this power." The court proceeds to say (p. 526):

> "In our opinion the mere existence of such a right unexercised, does not affect the vesting of the property passing by the trust deed . . . the unused power of revocation does not deprive the beneficiaries of their interest, or make it contingent on the donor's death. The effect of the reserved right to change the beneficiaries was considered in *Tyler* v. *Treasurer & Receiver General,* 226 Mass. 306. In that case it was sought to impose a succession tax upon payments made to the beneficiaries under a policy of insurance. It was said in the opinion, page 309: 'A reserved right to change the beneficiary does not affect the essential nature of the rights of the beneficiary so long as they last. Whatever the insured does in way of designation of a beneficiary takes effect forthwith . . . it is a present gift which, so far as concerns him, takes effect at once both in possession and enjoyment by the beneficiary'; and it was there held that the right to the amount due on the policy was not contingent on the death of the insured, and that by designating a beneficiary, both the gift and the grant took effect in possession and enjoyment at once."

Of course, the money payable under the policy of life insurance would not actually come into the possession and enjoyment of the beneficiaries until after the death of the person who was both grantor and insured, and, in that limited sense, the possession and enjoyment of it was contingent upon his death.

Indeed, our case is stronger than the Dexter case, because

in our case Mr. Brooks had no power whatever either to revoke or to alter except with the concurrence, in writing, of one of the Trustees. The trusts, and the trust property, were entirely out of his own hands and his own control.

It may be suggested, in view of certain language in the opinion of the Massachusetts court (Record, p. 36), that any argument about the constitutionality of a retroactive excise is "inapplicable" because that court holds that the trust instrument includes a power of appointment within the meaning of Acts of 1909, Chapter 527, Section 8 (see Appendix), and this court must accept that ruling. The answer has already been suggested elsewhere in this brief (*supra*, p. 36), where it is said that, while it is for the state court to say what the meaning and effect of the Massachusetts legislation are, yet, if that court so construes statutes that their purpose and effect are to impose an unreasonable and arbitrary excise, then it is open to this court to declare those statutes unconstitutional. That is so, no matter what statute is used as a means of reaching the unreasonable and arbitrary result; and so, if this particular statute helps to bring these respondents within the scope of the unreasonable and arbitrary tax (which they deny), it must fall with the rest. The constitutional argument cannot be made inapplicable merely by saying that it is.

III. CONSTITUTIONAL QUESTIONS NOT SPECIFICALLY RAISED.

That the Petition of the Trustees might not specifically direct attention to the constitutional questions could not be important. That petition certainly asks the court to instruct the Trustees as to their duty with reference to the payment of the tax. The court would scarcely instruct them that it is their duty to pay a tax which the legislature had no power to levy. The opinion states plainly that these

constitutional questions were raised and argued (Record, pp. 35, 36). In any event, Paragraphs 17 and 18 of the Petition do raise these questions (Record, pp. 19–21).

IV. THE INTERESTS OF ELEANOR SALTONSTALL AND LAWRENCE BROOKS ARE INTANGIBLE PERSONALTY WHICH IS SUBJECT TO INHERITANCE TAX BY MASSACHUSETTS AS THE STATE IN WHICH THE DONOR DIED DOMICILED.

Assuming that the interests of Eleanor Saltonstall and Lawrence Brooks are "Intangible Personalty," then the remainder of the proposition, that these interests are subject to this tax by Massachusetts, "as the State in which the donor died domiciled," is denied, upon the ground that transfers of personalty *inter vivos* are governed by, and effected by force of, the law of the *situs* of the personalty—not by the law of the domicile of the donor.

V. THE INTERESTS OF ELEANOR SALTONSTALL AND LAWRENCE BROOKS WERE PROPERTY WITHIN THE JURISDICTION OF MASSACHUSETTS UPON JANUARY 27, 1920.

If it be true that "the interests of Eleanor Saltonstall and Lawrence Brooks were property within the jurisdiction of Massachusetts upon January 27, 1920," then it is also true that this "property" had been vested in them since 1905.

It is true that a state has the power to tax all the property "which has a physical *situs* within its borders," but not that it has the right to tax property "which must be obtained from persons or corporations there located" if that property has a *situs* in other jurisdictions, or consists of shares in foreign corporations or in foreign trusts with transferable shares.

The true answer to most of what has been said in behalf of the Commonwealth is that it is applicable only to taxes on property, and not to excise taxes. In the case of an excise tax, such as we are dealing with here, the important consideration--the decisive consideration—is: From what state is derived the privilege, or "commodity," upon which the tax is imposed? By that state only can the tax be levied.

One further suggestion in conclusion:

This is an excise tax, the Massachusetts court holds. It is, therefore, incumbent upon the Commonwealth of Massachusetts to point out to the court some "commodity," or privilege, of the respondents upon which it can be laid.

Three possible ones can be suggested, as follows:

(1) "Possession and enjoyment" or "coming into possession and enjoyment."

That is here only another name for having and using the income, for enjoying something *to which we were already entitled in law,* and such a tax would be a tax on that income, and so a tax on property.

(2) The right to acquire *title* to *property,* or an interest in property.

That has been a vested property right since 1905, and an excise cannot be laid upon it in 1907 or in 1920.

(3) The right to *immediate* possession or enjoyment of the income.

Immediate—when? Immediate upon the death of Peter C. Brooks. But the right to immediate possession upon the death of Peter C. Brooks is a right which has been vested in, and has belonged to, these respondents ever since 1905, and could not in 1907 or in 1920, be subjected to an excise.

The plain truth is that no new, or additional, right or privilege has been acquired by these respondents since September 1, 1907. The only changes in their situation, the only new factors in the situation, since the enactment of the statute of 1907, are two; namely—

(*a*) The lapse of time.

(*b*) The death of Mr. Brooks.

Neither of these is a "commodity" or "privilege" upon which an excise can be laid.

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APPENDIX

The relevant parts of the statutes of Massachusetts which have an important bearing on the case are the following:

Acts of 1907, Ch. 563:

SECTION 1. All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, . . . made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, . . . shall be subject to a tax of five per cent. of its value for the use of the Commonwealth.

SECTION 7. Any person or persons entitled to a future interest or to future interests in any property may pay the tax on account of the same at any time before such tax would be due . . . and in such cases the tax shall be assessed upon the actual value of the interest at the time of the payment of the tax. . . .

SECTION 25. This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date; but said estates and property shall remain subject to the provisions of the laws in force prior to the passage of this act.

SECTION 27. This act shall take effect on the first day of September in the year nineteen hundred and seven.

Approved: June 27, 1907.

Acts of 1909, Ch. 490, Part IV.

This re-enacted Sections 1 and 7 of the Acts of 1907 without change in any respect material here, and re-enacted Section 25 verbatim.

Acts of 1909, Ch. 527.

Section 8 of the Act added a new section to the original Act, as follows:

SECTION 8. Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure. . . . The provisions of section twenty-five of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven are hereby repealed in so far as the same are inconsistent with the provisions of this act.

Acts of 1912, Ch. 678.

This Act revised Section 1 of the 1907 Act in particulars unimportant in this case, left Section 25 untouched, and added a new section, Section 3, as follows:

SECTION 3. The provisions of section one of this act shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant or gift except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof; and to all property passing by the exercise of or failure or neglect to exercise a power of appointment, whenever created, unless such exercise or failure or neglect to exercise such power of appointment over such property

so passing has already been taxed under the provisions of a prior statute and the said tax paid or guaranteed or secured as provided by law; and the estates of persons dying prior to the passage hereof, and all property passing by deed, grant or gift taking effect in possession or enjoyment prior to the passage hereof, and all property passing by the exercise of or failure or neglect to exercise a power of appointment prior to the passage hereof, shall remain subject to the laws in force prior to the passage hereof.

Acts of 1914, Ch. 563.

This amended Section 25 of the original Act of 1907 so as to read as follows:

SECTION 25. This part shall not apply to estates of persons deceased prior to the date when chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven took effect, nor to property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date; but said estates and property shall remain subject to the provisions of law in force prior to the passage of said chapter.

Acts of 1916, Ch. 268.

Section 1 of the Act substituted for Section 1 of the Acts of 1907, as amended, a new section establishing new rates of taxation, but otherwise leaving the words of the original statute, which are material to this case, unchanged.

Sections 2 and 3 are not material here.

Section 4 provided as follows:

SECTION 4. This act shall take effect upon its passage, but it shall apply only to property or interests therein passing or accruing upon the death of persons who die subsequently to the passage hereof. . . .

Acts of 1918, Ch. 191.

Section 2 provided that the Act shall apply only to prop-

erty or interests therein passing or accruing upon the death of persons who should die subsequent to the passage thereof and within one year thereafter; and the Act is, therefore, unimportant for the purposes of this case.

Acts of 1919, Ch. 342, Sec. 4.

This dealt only with the rate of taxation.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1927

No. 144

ELEANOR SALTONSTALL AND LAWRENCE BROOKS,
Respondents, *Plaintiffs-in-Error*

v.

LEVERETT SALTONSTALL ET AL., Trustees, Petitioners, and Treasurer and Receiver General of the Commonwealth of Massachusetts

SUPPLEMENTAL BRIEF ON THE QUESTION OF JURISDICTION IN BEHALF OF ELEANOR SALTONSTALL AND LAWRENCE BROOKS, RESPONDENTS, PLAINTIFFS-IN-ERROR

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Attorneys for Eleanor Saltonstall and Lawrence Brooks.

THOMAS HUNT,
Of Counsel.

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v.

LEVERETT SALTONSTALL ET AL., TRUSTEES, PETITIONERS, AND TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

SUPPLEMENTAL BRIEF ON THE QUESTION OF JURISDICTION IN BEHALF OF ELEANOR SALTONSTALL AND LAWRENCE BROOKS, RESPONDENTS, PLAINTIFFS-IN-ERROR

On pages 1 to 5, inclusive, of the original brief for these plaintiffs-in-error, the grounds on which the jurisdiction of this court is invoked are stated with what seemed to be, at the time, sufficient elaboration. While the plaintiffs-in-error still feel that that was sufficient to show that the question is not, in the present state of the law, a debatable one, the argument for the Treasurer and Receiver General, contained in pages 3 to 11 of his brief, seems to indicate misapprehension of the entire issue; and therefore, to obviate any possible confusion, and at the risk of arguing at length propositions which in this court are now axiomatic, this supplemental brief is submitted.

1. The claim of these plaintiffs-in-error to be heard by this court is based on the Judicial Code, Section 237 (*a*), first sentence, second clause, which reads as follows:

> " . . . or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity. . . ."

This clause is to be distinguished from one of the grounds for certiorari set forth in Section 237 (*b*) in the following words:

> ". . . or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution. . . ."

The plaintiffs-in-error rely only on the first ground, and that ground, with the decisions dealing with it, is entirely distinct from the second. The brief for the Treasurer and Receiver General does not, either in argument or in cases cited, clearly recognize this distinction, which is an essential one. The first clause, on which alone the plaintiffs-in-error rely, deals with a definite issue, namely, the decision of the state court *upon the validity of a state statute.*

The second clause, which has no connection with this case, deals with something more indefinite—a "right, title, privilege, or immunity" under the Constitution; and it is easy to see the reason for the requirement, not present in the first clause, that these must have been "specially set up or claimed."

Before the Act of February 13, 1925, amending the Judicial Code, the second clause constituted an additional ground for a writ of error, instead of being, as it is now, ground for certiorari only; but even then the inherent difference between the several grounds of jurisdiction was recognized and carefully maintained.

In *Harding* v. *Illinois,* 196 U. S. 78, cited on page 7 of the brief for the Treasurer and Receiver General, Mr. Justice Day said (at p. 85):

> "The assertion that a judgment rests upon an unconstitutional state statute, the validity of which has been drawn in question and sustained, presents one of a class of cases which may be reviewed here. In the analysis of section 709 of the Revised Statutes of the United States, in *Columbia Water Power Co.* v. *Columbia Street Railway, etc., Co.,* 172 U. S. 475, 488, it was pointed out that cases of the character of the one now under consideration come within the second class of those provided for in the section: 'Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.'
>
> "It has been frequently held that in cases coming within this class less particularity is required in asserting the Federal right than in cases in the third class, wherein a right, title, privilege or immunity is claimed under the United States, and the decision is against such right, title, privilege or immunity. In the latter class the statute requires such right or privilege to be 'specially set up and claimed.' Under the second class it may be said to be the result of the rulings in this court that if the Federal question appears in the record in the state court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here. *Columbia Water Power Co.* v. *Columbia Street Railway, etc. Co.,* 172 U. S. 475, and cases cited on page 488. Nevertheless, it is equally well settled that the right of review, dependent upon the adverse decision of a Federal question, exists only in those cases wherein a decision of the question involved was brought in some proper manner to the attention of the court and decided, or it appears that the judgment rendered could not have been given without deciding it. *Fowler* v. *Lamson,* 164 U. S. 252; *Clarke* v. *McDade,* 165 U. S. 168, 172."

A more recent discussion is found in *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, where Mr. Justice Van Devanter said (at p. 287 ff.):

> "The case is here on a writ of error and our jurisdiction is challenged. The objection is not that we are without power to review the judgment, but that it can be reviewed only on a writ of certiorari. The controlling statute is Sec. 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. Besides confining our power of review in cases litigated in the state courts to those in which the decision of a federal question is involved, this jurisdictional section provides that the review in cases falling within certain classes may be on writ of error and in others on writ of certiorari, the distinguishing or dividing line being drawn according to the nature of the federal question and the way in which the state court decides it. Some cases may fall on both sides of the line, but with this we are not now concerned. Among those in which the review may be on writ of error, the section includes—
>
> > 'any suit . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.'
>
> "Among those in which the review may be on writ of certiorari are—
>
> > 'any cause . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity'; and
> >
> > 'any cause . . . where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority.'

"In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144; *McCullough* v. *Virginia*, 172 U. S. 102, 116–117; *General Oil Co.* v. *Crain*, 209 U. S. 211, 228; *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, 432. And see *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 3, 27. The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another. *Poindexter* v. *Greenhow*, 114 U. S. 270, 295: *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne*, 224 U. S. 354; *Kansas City Southern Ry. Co.* v. *Anderson*, 233 U. S. 325. Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. *Yazoo & Mississippi Valley R.R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576. Neither does it matter on what ground the court upheld and enforced the statute. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute the review may be on a writ of error; and if it be resolved against the validity the review can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put.

"It is loosely said in one of the briefs for the plaintiff that the 'sole question for decision' is whether the contract was a part of interstate commerce; but we attach no importance to this, because it not only is said

in the same brief that the plaintiff 'maintained in the state court, and it maintains here, that the Kentucky statute, as construed and applied in this case by the state court, is unconstitutional under the commerce clause,' but much of that brief and of another is devoted to an effort to show the invalidity of the statute in that regard.

"Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. Like rulings on like grounds will be found in *Eureka Pipe Line Co.* v. *Hallanan,* ante, 265, and *United Fuel Gas Co.* v. *Hallanan,* ante, 277."

There is then, in that section of the Judicial Code upon the strength of which these plaintiffs-in-error now invoke the jurisdiction of this court, no requirement (as there is in other sections) as to the *manner* in which the Federal question must have been raised. The only question to be considered here is whether, as a matter of fact, the state court decided, in dealing with a decisive issue, that a state statute was not repugnant to the Constitution of the United States.

2. The plaintiffs-in-error base their right to a writ of error under Section 237(*a*) of the Judicial Code upon the fact that in this suit they drew in question certain statutes of Massachusetts on the ground of their being repugnant to the Constitution of the United States; that these statutes were actually brought to the attention of the highest court of that Commonwealth; that a decision as to their validity was a necessary element in the decision of the cause; that they were actually considered by that court; and that the decision was in favor of their validity, and adverse to these plaintiffs-in-error.

The pertinent parts of the statutes referred to are set forth in the Appendix to the main brief of the plaintiffs-in-error, on pages 67 to 70 inclusive.

The parts of the printed record from an examination of which this court will find that the Federal question was raised, as stated above, are the following:

A. Petition by the Trustees for instructions, paragraph 17(*g*) (Record, pp. 19–20), which reads as follows:

> "The Petitioners contend as a matter of law . . . (*g*) That said act is unconstitutional if, and in so far as, it applies to property originally conveyed to the Trustees, or to the property acquired by the Trustees through investing the income derived from the trust property, before the enactment of Chapter 463* of the Acts of 1914."

B. Answer of these Respondents (Record, p. 26, foot; p. 27, top), concurring in this contention of law.

C. The following parts of the opinion of the Supreme Judicial Court of Massachusetts:

> "It follows from what has been said respecting the meaning of commodity, succession, passing and accru-

*This is a typographical error in the petition. The statute intended, and assumed by the Supreme Judicial Court to be intended, was Chapter 453 of the Acts of 1914.

ing, as used in the Constitution and laws of Massachusetts, according to their interpretation by decisions of this court, that there is *no violation of the Fourteenth Amendment* of the Constitution of the United States in the excise here in question" (Record, p. 35) (main Brief, p. 3).

"The nature of the excise here in question being an excise upon that part of the commodity of succession which consists of the vesting of the property in possession and enjoyment in the daughter and son, upon the death of Mr. Brooks, a vesting which arose from his failure or omission to participate in the exercise of the right of appointment reserved to him in the trust instrument to change its beneficiaries, renders inapplicable *the argument in behalf of the daughter and son* to the effect that the excise is in contravention of the Fourteenth Amendment as a taking of property without due process of law. The same is true of *their argument* that the excise impairs the obligation of any contract involved in the trust instrument" (Record, p. 36) (main Brief, p. 3).

"The commodity upon which this excise is laid is within the jurisdiction of this Commonwealth" (Record, p. 36) (main Brief, p. 4).

"The cumulative effect of all these factors is that the element of succession on which the excise is levied took place in this Commonwealth with respect to property which may be made subject to our excise tax upon the commodity of succession" (Record, p. 37) (main Brief, p. 4).

D. Rescript of the Supreme Judicial Court (Record, p. 29):

"Brief Statement of the Grounds and Reasons of the Decision

"The reasons of the decision are set forth at length in the opinion filed with the reporter of decisions, to which reference is made."

This is in obedience to the requirements of General Laws, Chapter 211, Section 8, which provides:

"The full court shall, as soon as may be after the decision of the questions submitted to it, make and enter a proper order, direction, judgment or decree for the further disposition of the case, or cause a rescript, containing a brief statement of the grounds and reasons of the decision to be filed therein . . .";

and Section 9, which provides:

"The records and rescripts which are made after the decision of the questions of law shall contain a brief statement of the reasons therefor; and if no further opinion is written within sixty days, the reporter shall publish the case with the opinion contained in such record or rescript."

3. In order to take jurisdiction under this particular clause of Section 237(*a*) of the Judicial Code, this court must be satisfied, as a matter of fact, that the Federal question was actually considered and necessarily passed upon by the state court.

For the purpose of ascertaining this fact, various sources of information are open to this court, and if, from a consideration of any or all of these sources, it be satisfied as to the existence of this necessary fact, it must take jurisdiction.

There was a time when this court was prevented by certain language in the Judiciary Act (later the Judicial Code) from availing itself of all the natural sources of information upon the subject, but the removal of that language from the Act has left the court with such freedom of investigation that the restrictions which it imposes can be said to be dictated merely by the requirements of certainty of proof. The original "Judiciary Act," passed on September 24, 1789, which had in its 25th section the provisions analogous to the present Section 237(*a*) of the Judicial Code, contained also the following language:

> ". . . but no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid *than such as appears on the face of the record. . . .*"

By the Act of February 5, 1867, these words were struck out and have never since been present. The effect of this omission was discussed at length in *Murdock* v. *Memphis*, 20 Wall. 590, 633 (cited in main Brief, p. 5). The conclusion of the court was that, whereas the words in question had restricted its investigation to that technical, and increasingly uncertain, thing called the "record," their removal left no reason why the court could not in all cases add the opinion of the state court to its sources of information, as it had already done where that opinion could technically be called a part of the record. We do not quote the

words of the court here, because that case was merely the turning-point, and quotations from later cases will show how the freedom from restriction, first stated in *Murdock* v. *Memphis*, has allowed this court to bring the requirements of proof of the existence of the Federal question to their present clear and reasonable form.

This court must establish some criterion which will protect it from the approaches of overzealous litigants who seek its jurisdiction by the belated introduction of some Federal question. That is done by the rule which is most simply stated by Mr. Justice White in *Missouri, Kansas & Texas Railway Co.* v. *Elliott*, 184 U. S. 530, at page 534:

> "All that is essential is that the Federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal."

If the pleadings, or other parts of the technical common-law "record," raised the Federal question in an unambiguous manner, there could be no doubt that it was brought to the attention of the state court, and this court would not have to look further to find ground for its jurisdiction. But there are cases where the Federal question, though not raised in such an obvious manner, was nevertheless present, and then this court must look elsewhere to find it.

Where the opinion of the state court is, by statute or settled practice, part of the technical "record" (as it is here), there is no greater difficulty about looking at that than at the pleadings, and this court has frequently so held.

> *Gross* v. *United States Mortgage Co.*, 108 U. S. 477 (main Brief, p. 5).

This case, like several others cited here, was one in which a right, title, or immunity under the Constitution had to be specially set up and claimed, and, in view of the words of the court in *Harding* v. *Illinois* and *Dahnke-Walker Co.* v. *Bondurant* (supra, pp. 3, 4), it is a *fortiori* authority for a

case arising under the clause on which these plaintiffs-in-error rely. Mr. Justice Harlan quoted from *Murdock* v. *Memphis* (supra, page 10), and then went on to say (at p. 486):

> "We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the Supreme Court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the state court adversely to a right, title or immunity, under the Constitution or laws of the United States and specially set up and claimed by the party who brings the writ. Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois which requires, not only that the Justices of the Supreme Court of the State shall deliver and file written opinions in cases submitted to it, but that 'such opinions shall also be spread at large upon the records of the court.' Rev. Stat. Ill., 1874, p. 329, ch. 37, sec. 16. This statutory provision would seem to bring the case within the rule which permits an examination of the opinions of the Supreme Court of Louisiana to ascertain whether the case was determined upon any ground necessarily involving a federal question within the reviewing power of this court."

Kreiger v. *Shelby Railroad Co.*, 125 U. S. 39 (main Brief, p. 5).

Mr. Justice Gray said (at p. 44):

> "The Statutes of Kentucky require written opinions to be delivered by the court of appeals in all cases, and to be recorded by its clerk. Code of Civ. Proc., sec. 765; Gen. Stat., chap. 28, art. 2, sec. 10; chap. 16, art. 1, sec. 1. By the settled course of decision under the existing judiciary acts of the United States, this court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the state court."

Thompson v. *Maxwell Land Grant Co.*, 168 U. S. 451 (main Brief, p. 5).

In this case Mr. Justice Brewer said (at p. 456):

> "Wherever a case comes from the highest court of a State for review, and by statute or settled practice in that State the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment."

In those states where the opinion of the state court is not technically part of the record, this court, since the decision in *Murdock* v. *Memphis* (supra, p. 10), has nevertheless repeatedly held that it can look to that opinion for aid in determining whether the Federal question was actually decided as an essential part of the case.

Philadelphia Fire Association v. *New York*, 119 U. S. 110 (main Brief, p. 5)

Mr. Justice Blatchford said (at p. 115):

> "The defendant claims here the benefit of the Fourteenth Amendment; and a question has occurred as to whether the record presents that point for our review. There being no pleadings, the obvious place to look for the claim would be the agreed statement of facts. But all that is there said is that the defendant insists that the statute is 'unconstitutional and void and not a legitimate exercise of legislative power.' The question was considered in both the supreme court and the court of appeals, as to the validity of the statute, under the Constitution of New York, as being a law made to depend for its operation on the legislation of a foreign State, and thus an illegitimate exercise of legislative power. This contention is fairly within the words of the agreed statement, and if it depended wholly on that statement to determine whether the record raises a federal question, some doubt might exist. But in view of what was said in *Murdock* v. *Memphis*, 20 Wall. 590, 633 (87 U. S.; bk. 22, L. ed. 429, 443), in *Gross* v. *U. S. Mortgage Co.*, 108 U. S. 477 (Bk. 27, L. ed. 795), and in *Adams Co.* v. *Burlington & Mo. R.R. Co.*, 112 U. S. 123 (Bk. 28, L. ed. 678), we think that we are at liberty to look into the opinion of the court of appeals, a copy

of which, duly authenticated by the proper officer, is transmitted to us with the record, in compliance with our Eighth Rule, for the purpose of aiding in determining what was decided by that Court. From that opinion it appears that the court not only decided against the defendant all the questions other than federal which were raised, including two under the Constitution of New York, but also decided against it the federal question referred to. If the court had decided in its favor any one of the other questions which went to the whole cause of action, there would have been no necessity for considering the federal question. But as it was, the decision of that question became necessary to the disposition of the case, and was fully considered, not *sua sponte,* but as a point presented by the defendant."

Loeb v. *Columbia Townships Trustees,* 179 U. S. 472 (main Brief, p. 5).

This was a writ of error to a United States Circuit Court, but the question of jurisdiction involved the same principles, and the court therefore discussed the practice in regard to writs of error to state courts. After reviewing the various cases, some of which have just been cited, Mr. Justice Harlan went on to say (at p. 484):

"It has long been the practice of this court in cases coming from a state court to refer to its opinion made part of the record for the purpose of ascertaining whether any Federal right, specially set up or claimed, had been denied to the plaintiff in error, or whether the judgment rested upon any ground of local law sufficient to dispose of the case without reference to any question of a Federal character. And we have done this without stopping to inquire whether there was any statute of the State requiring the opinion of the court to be filed in the case as part of the record."

Missouri, Kansas & Texas Railway Co. v. *Elliott,* 184 U. S. 530 (main Brief, p. 5).

In this case, Mr. Justice White said (at pp. 533–534):

"But it is equally true that even although the allegations of Federal right made in the state court were so

general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a Federal question, although arising on ambiguous averments, then a Federal controversy having been actually decided the right of this court to review obtains. *Oxley Stave Co.* v. *Butler,* 166 U. S. 648, 660. All that is essential is that the Federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago etc., Ry. Co.* v. *Chicago,* 166 U. S. 226. And of course, where it is shown by the record that the state court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a Federal question in a petition for rehearing in the highest court of the State is too late, yet when a question is thus raised and it is actually considered and decided by the state court, the right to review exists. *Mallett* v. *North Carolina,* 181 U. S. 589, 592."

It might be said that the cases so far cited go no further than holding that the opinion of the state court cannot give jurisdiction alone but can be looked at merely as an aid in determining what may be ambiguous upon the rest of the record. These plaintiffs-in-error do not need to go further than this, but a recent decision of this court shows greater liberality.

Whitney v. *California,* 274 U. S. 357.

In that case there was nothing at all on the record in the state court, *nor in the opinion,* showing that the Federal question had been raised or considered, but it was held that an order of the state court stating that it had considered and passed upon such a question was a sufficient, though not a commendable, means of giving this court jurisdiction. Mr. Justice Sanford said (at p. 360):

"It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Crowell* v. *Randell,* 10 Pet. 368, 392; *Railroad Co.* v. *Rock,* 4 Wall., 177, 180; *California Powder Works* v. *Davis,* 151 U. S. 389, 393; *Cincinnati etc. Railway* v. *Slade,* 216 U. S. 78, 83; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 343; *New York* v. *Kleinert,* 268 U. S. 646, 650.

"Here the record does not show that the defendant raised or that the State courts considered or decided any Federal question whatever, excepting as appears in an order made and entered by the Court of Appeal after it had decided the case and the writ of error had issued and been returned to this Court. A certified copy of that order, brought here as an addition to the record, shows that it was made and entered pursuant to a stipulation of the parties, approved by the court, and that it contains the following statement:

> 'The question whether the California Criminal Syndicalism Act . . . and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court.'

"In *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, 182, where it appeared that a federal question had been presented in a petition in error to the State Supreme Court in a case in which the judgment was affirmed without opinion, it was held that the certificate of that court to the effect that it had considered and necessarily decided this question was sufficient to show its existence. And see *Marvin* v. *Trout,* 199 U. S. 212, 217, *et seq.; Consolidated Turnpike* v. *Norfolk, etc., Railway,* 228 U. S. 596, 599.

"So,—while the unusual course here taken to show that federal questions were raised and decided below is

not to be commended—we shall give effect to the order of the Court of Appeal as would be done if the statement had been made in the opinion of that court when delivered. See *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 484–486; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 116; *Home for Incurables* v. *City of New York*, 187 U. S. 155, 157; *Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 179, 180; *Rector* v. *City Deposit Bank*, 200 U. S. 405, 412; *Haire* v. *Rice*, 204 U. S. 291, 299; *Chambers* v. *Baltimore, etc., Railroad*, 207 U. S. 142, 148; *Atchison, etc., Railway* v. *Sowers*, 213 U. S. 55, 62; *Consolidated Turnpike Co.* v. *Norfolk, etc., Railway*, 228 U. S. 596, 599; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 242; *North Carolina Railroad* v. *Zachary*, 232 U. S. 248, 257; *Chicago, etc., Railway* v. *Perry*, 259 U. S. 548, 551.

"And here, since it appears from the statement in the order of the Court of Appeal that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, was considered and passed upon by that court—this being a federal question constituting an appropriate ground for a review of the judgment—we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside."

Whatever may have been the attitude of this court when its freedom from statutory bondage to "the face of the record" was an unfamiliar thing, the statement of Mr. Justice Sanford—"We shall give effect to the order of the Court of Appeal as would be done if the statement had been made in the opinion of that court when delivered"—made without qualification, leaves little doubt that, if it appear from the opinion, and from the opinion alone, that the Federal question was considered by the state court, that is sufficient.

4. This court can take jurisdiction of the case at bar on a writ of error under Section 237(*a*) of the Judicial Code on the least liberal of the grounds discussed above.

(*a*) From an examination of the pleadings here, this court could say that it was at least reasonably clear that the Federal question had been seasonably raised. Paragraph 17(*g*) of the Petition for Instructions (quoted *supra*, p. 7) makes the claim that these Massachusetts statutes are "unconstitutional," and in this claim the Answer of these Respondents concurs. Though not enough, standing alone, to convince this court that the Supreme Judicial Court actually decided the question of constitutionality, these pleadings show conclusively that the Federal question is not an afterthought.

(*b*) A decision as to the validity of the statutes was a necessary element in the disposition of the case. The issue was the liability of these plaintiffs-in-error to a tax under these statutes. If it was at any time claimed that these statutes were repugnant to the Constitution of the United States, the state court must either have decided the question of their validity, or have ignored it when raised.

(*c*) The opinion of the Supreme Judicial Court puts the matter beyond all doubt. The parts previously quoted (*supra*, pp. 7, 8) show conclusively that the constitutionality of these statutes was argued and considered and that the decision was in favor of their validity. In view of the decisions, beginning with *Murdock* v. *Memphis*, which have been reviewed here, it is not necessary to consider whether the opinion in this case should be called a part of the "record" in the technical sense; but the quotations from the rescript and the General Laws of Massachusetts in regard to opinions (*supra*, pp. 8, 9) show pretty conclusively that it is. The important point is that in any event this court can look at the opinion, and, when it does, will find proof positive that the Federal questions were raised and passed upon.

CONCLUSION

This case is here by writ of error, brought under the provisions of Section 237(*a*) of the Judicial Code.

The clause relied on by the plaintiffs-in-error, unlike other parts of the Judicial Code, makes no requirement as to the *manner* in which the Federal question must have been raised in the state court, but requires only its presence and determination.

In the present state of the law, this court has considerable discretion with reference to the sources of its information as to that fact; but it needs to use only a small part of that discretion in order to be convinced, beyond all doubt, that in this case these Federal questions were actually presented and passed upon in the state court.

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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 741.

ELEANOR SALTONSTALL AND LAWRENCE BROOKS,

Plaintiffs in Error,

v.

TREASURER AND RECEIVER GENERAL OF MASSACHUSETTS, ET ALS.,

Defendants in Error.

BRIEF FOR TREASURER AND RECEIVER GENERAL.

For the Treasurer and Receiver General,

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Special Assistant Attorney General.

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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 741.

ELEANOR SALTONSTALL AND LAWRENCE BROOKS,

Plaintiffs in Error,

v.

TREASURER AND RECEIVER GENERAL OF MASSACHUSETTS, ET ALS.,

Defendants in Error.

BRIEF FOR TREASURER AND RECEIVER GENERAL.

STATEMENT OF THE CASE.

This is a petition in equity (p. 11) brought in the Supreme Judicial Court of Massachusetts by Leverett Saltonstall and two others, trustees under a deed of trust made on April 3, 1905, by Peter C. Brooks, late of Medford, Massachusetts, for instructions as to whether the interests given respectively by said deed to Eleanor Saltonstall and Lawrence Brooks (children of said Peter) are subject to inheritance tax (p. 20, par. 18, cl. 1 and 2) under the laws of Massachusetts. The deed as construed by the court provides in substance that upon the death of the grantor each plaintiff in error takes in enjoyment for life a spendthrift trust in one-half the net income of the trust estate, the interest of Lawrence being further qualified by certain discretionary powers

given to the trustees by an amendment to the deed. (P. 30–31.) The *petition* raises no constitutional question whatsoever with respect to either of these interests. (P. 20, 21.)

The case came before a single justice of the Supreme Judicial Court upon paragraph 16 of the petition (p. 3) for hearing upon certain disputed questions of fact as to the law of certain states. He made certain findings to which no exception was taken (p. 3–11) and reported the case to the Full Bench "upon the petition, answers and this finding of fact" such decree to be entered as justice and equity require (p. 11). Neither the petition (p. 20, 21) nor the answers (p. 26, 27), nor the report (p. 11) raises *any* constitutional question whatsoever with respect to the interests of plaintiff in error under this deed of trust.

The case was heard upon this report by the Full Court, which on August 31, 1926, entered a decree (p. 29) instructing the trustees that the respective interests of Eleanor Saltonstall and Lawrence Brooks were taxable both under Mass. St. 1916, c. 268 (p. 29, 31), and also under St. 1909, c. 527, sec. 8 (p. 29, 32), upon their respective values at the death of the grantor on January 27, 1920 (p. 29, 37), only one tax on each interest being levied under both said acts. The court also instructed that each interest was subject to the special additional tax imposed by St. 1918, c. 191, as revived and re-enacted by St. 1919, c. 342, sec. 4 (p. 29, 33). The court declined to instruct the trustees (p. 37) as to the excise upon the *corpus* of fund as requested by the trustees. (See p. 20, pars. (*d*) to (*j*); p. 21, pars. 3 to 11.)

The plaintiffs in error thereupon sued out this writ of error, assigning for error (p. 39) that Massachusetts has no jurisdiction to impose the tax, and that the statutes

held applicable by the court (which are not even named in the petition or answers or the report of the single justice) are repugnant to U. S. Cons., Art. I, sec. 10, as impairing the obligation of contract, and to the Fourteenth Amendment as depriving the plaintiffs in error of property without due process of law and denying to them the equal protection of the laws. This assignment of errors is the *first* claim *in the record* by plaintiffs in error that the statutes held applicable by the court are, *as applied to their interests*, repugnant to the Federal Constitution, or indeed to any constitution whatsoever.

The Treasurer and Receiver General therefore contends:

I. That the record presents no Federal question sufficient to give this court jurisdiction upon this writ of error.

II. That Massachusetts has jurisdiction to levy a succession tax upon the respective interests of plaintiffs in error.

III. That the several statutes held applicable by the court to the interests of plaintiffs in error are not repugnant to the Federal Constitution.

The second and third contentions relate to the merits. They are not material if the writ is dismissed for want of jurisdiction. But if these contentions are sound (as we believe they are) dismissal for want of jurisdiction can work no prejudice to plaintiffs in error.

ARGUMENT

I

The Record presents no Federal Question sufficient to give this Court Appellate Jurisdiction

Judicial Code, sec. 237, as amended by the Act of February 13, 1925, gives to this court jurisdiction to review upon a writ of error a final judgment or decree in

any suit in the highest court of a state in which a decision in the suit could be had,

". . . where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . of the United States and the decision is in favor of validity. . . ."

In order to draw in question the validity of a statute on the ground of its being repugnant to the Federal Constitution, the claim of repugnancy must be duly raised *by the record*, in the State Court that claim must be overruled by the state court, and it must further appear that the decision of the Federal question was necessary to the judgment rendered. If the Federal question is not duly raised *by the record* in the state court there is no foundation for the writ of error and it must be dismissed for want of jurisdiction.

Cleveland & Pittsburgh R.R. *v.* Cleveland, 235 U. S. 50, 55.
Seaboard Air Line *v.* Duvall, 225 U. S. 477, 481.
Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308.
Oxley Stove Co. *v.* Butler County, 166 U. S. 648.
Fowler *v.* Lamson, 164 U. S. 252, 255.

The case at bar was begun by a petition for instructions brought by the trustees of the Brooks trust (*defendants in error here*) in the Supreme Judicial Court of Massachusetts (p. 11–25). The first fifteen paragraphs set out the creation and the history of the trust (p. 11–19). Paragraph 16 makes certain allegations as to the law "of the several states in which property belonging to the Trustees is situated." Paragraph 17 (p. 19) reads as follows:

17. The Petitioners contend as a matter of law —

(*a*) That the transfers above set forth were not made in contemplation of death.

(*b*) That the transfers did not take effect in possession or enjoyment after the death of Mr. Brooks with respect to the life interest of Eleanor Saltonstall.

(*c*) That the transfers did not take effect in possession or enjoyment after the death of Mr. Brooks with respect to the life interest of Lawrence Brooks.

(*d*) That, in so far as the property originally transferred consisted of stocks of corporations organized outside of Massachusetts, or in shares in the Chicago Real Estate Trust, the transfer of such stocks did not take effect by virtue of the laws of Massachusetts, and that the provisions of Chapter 65 of the General Laws of Massachusetts do not apply to such shares.

(*e*) That, in so far as the property at the date of Mr. Brooks' death consisted of stocks in corporations organized outside of Massachusetts, or in shares in the Chicago Real Estate Trust, or in shares in the Marquette Trust, no change in possession or enjoyment with respect thereto took effect by virtue of the laws of Massachusetts and that the provisions of Chapter 65 of the General Laws of Massachusetts do not apply to such shares.

(*f*) That, even if that act applies to the property originally conveyed to the Trustees, it does not apply to property acquired by the Trustees through investing the income of the trust property.

(*g*) That said act (*i.e.*, G. L., c. 65) is unconstitutional if, and in so far as, it applies to property originally conveyed to the Trustees, or to the property acquired by the Trustees through investing the income derived from the trust property, before the enactment of Chapter 463 of the Acts of 1914.

(*h*) That if property owned by the trust at the date of Mr. Brooks' death, which was acquired prior to May 29, 1912, is taxable, it is taxable only at the tax rates in force prior to May 29, 1912.

(*i*) That if property owned by the trust at the date of Mr. Brooks' death which was acquired after May 29, 1912 and prior to May 26, 1916 is taxable, it is taxable only at the rates in force between said dates.

(*j*) That if property owned by the trust at the date of Mr. Brooks' death which was acquired after May 26, 1916 and prior to May 4, 1918 is taxable, it is taxable only at the rates in force between said dates.

Paragraph 18 (p. 20) contains the requests for instructions which in no way enlarge paragraph 17.

Examination of paragraphs 17 and 18 immediately discloses that only clauses (*b*) and (*c*) of paragraph 17 and clauses 1 and 2 of paragraph 18 relate specifically to the interests of Eleanor Saltonstall and Lawrence Brooks. Neither paragraph raises any constitutional question whatsoever, either under the State Constitution or under the Federal Constitution, *with respect to these interests.*

Paragraph 17, clauses (*e*) to (*j*) inclusive, makes divers contentions as to the application of "chapter 65 of the General Laws of Massachusetts" to the *corpus* of the estate. Clause (*g*) of this paragraph contends that "said act" (*i.e.*, G. L., c. 65) is "unconstitutional" as applied to a certain part of the *corpus*. This is the only claim of unconstitutionality made in the petition. Such a claim draws in question no right *under the Constitution of the United States* even with respect to the application of Chapter 65 of the General Laws of Massachusetts to the designated portion of the *corpus*. The claim does not even refer to the Federal Constitution. It is settled that in order to draw in question a right under the Constitution of the United States, the right which is relied on must be stated *in the record* with particularity.

Harding *v.* Illinois, 196 U. S. 78, 86.
Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308.
Home for Incurables *v.* City of New York, 187 U. S. 155, 158.
Erie Railroad Co. *v.* Purdy, 185 U. S. 148, 152.

Failure so to do is fatal to the jurisdiction of this court.

So far as the petition is concerned, the plaintiffs in error are driven to the position that a claim by the trustees that G. L., c. 65 is "unconstitutional" as applied to a part of the *corpus*, is a sufficient claim by the plaintiffs in error that it is "unconstitutional" as applied to their spendthrift trusts of net income. (See p. 31.) In the light of the decisions this claim is without foundation. But even if it were sound, it could not aid them. The court below held that their interests were taxable under St. 1916, c. 268, and St. 1909, c. 527, sec. 8, and also that St. 1919, c. 191, as revived by St. 1919, c. 342, were pertinent (p. 31–33). It decided nothing as to the applicability of Chapter 65 of the General Laws which took effect on January 1, 1921, almost a year after the settlor's death. Moreover, the court expressly refused to instruct the trustees as to the taxability of the *corpus*, since they had no present duty as to any excise thereon (p. 37). Thus the *only* constitutional question tendered by the petition was not raised by plaintiffs in error; does not draw in question any right under the Constitution of the United States; does not relate to the interests of the plaintiffs in error; does not concern the statutes held applicable by the court; and was not decided by the court. The petition therefore wholly fails to sustain the constitutional questions subsequently raised by the assignment of errors.

The plaintiffs in error are in no way aided by the answer of the Treasurer and Receiver General (p. 26) which admits the first 15 paragraphs of the petition, denies the allegations of the 16th paragraph, and leaves the petitioners to establish paragraphs 17 and 18 if material. This answer does not enlarge the matters raised by the petition by one jot or tittle.

The plaintiffs in error do not specifically raise any constitutional question whatsoever in their answer (p. 26). They admit as true all the matters set forth in the petition. They "concur with the petitioners in the contentions of law set forth in paragraph 17 of the petition" (p. 26–27). They pray that each of the petitioner's requests for instructions be answered in the negative (p. 27). They are content to "concur" with the petition — and the petition raises none of the matters which, *after the decision of the court*, they seek *now* to assign for error.

Upon this record the case was heard by Mr. Justice Wait upon the disputed allegations of paragraph 16 (p. 3). He made certain findings of fact to which no exception was taken (p. 3–11) and reported the case to the Full Court "upon the petition and answers and this finding of fact" (p. 11). Plainly this report carried to the Full Court no constitutional question which was not theretofore raised by the petition and answers — and the petition and answers raised no *Federal* question whatsoever even as to the *corpus*, nor any "constitutional" question *of any kind* as to the spendthrift trusts of net income taken for life by plaintiffs in error. Upon this record the Full Court instructed the trustees that the spendthrift trusts of plaintiffs in error were subject to the succession tax imposed under St. 1916, c. 268, and St. 1909, c. 527, and also to the special succession tax imposed by Gen. St. 1918, c. 191, as revived and re-

enacted by Gen. St. 1919, c. 342 (p. 29). None of these acts is even mentioned in the petition. The court decided nothing as to the constitutionality of General Laws, c. 65 — the only "constitutional" question raised by the petition and answers even with respect to the *corpus* — and declined to instruct as to the taxability of the *corpus* (p. 37), *to which alone* that "constitutional" question related. (See p. 20, par. 17 (*g*).)

It is immaterial whether the plaintiffs in error did, or did not attempt to raise a Federal question in their brief or by their argument before the Full Court. On that point the record is silent. A Federal question cannot be injected into the case at that time or in that way.

> Zadig *v.* Baldwin, 166 U. S. 485, 488.
> Sayward *v.* Denny, 158 U. S. 180, 183.

The principal question determined by the Full Court was as to the construction of the statutes which it held applicable to the interests of plaintiffs in error (p. 30–35). With that question this court has no concern. The Full Court was not asked by the record to decide, and did not need to decide, whether those acts as so applied, were repugnant to the Constitution of the United States. When the Full Court, although that question was not raised by the record, said that the statutes as construed and applied by it were not repugnant to the Fourteenth Amendment (p. 35) or to the Contract Clause (p. 36) it may well have only rejected an argument against the construction adopted. So viewed the statement of the court would not even amount to a *dictum* upon the constitutional point. But be that as it may, it is settled that this court has no jurisdiction to review a state judgment which can be sustained upon a non-Federal ground, even though a Federal question is duly raised and decided therein.

Gaar, Scott & Co. *v.* Shannon, 223 U. S. 468.
Enterprise Irrig. District *v.* Canal Co., 243 U. S. 157, 164.

Even if the statements of the court below be regarded as *dicta* upon a Federal question which was *not* presented to that court by the record, they are no basis for this writ of error. A *dictum* is merely an expression of judicial opinion upon a question which need not be decided. If this court has no jurisdiction to review a Federal question actually and duly raised and decided, where the judgment can rest upon a non-Federal ground, it is clearly without jurisdiction to review a mere *dictum* as to a Federal question on which the court below did not need to pass.

Neither the assignment of errors nor the writ of error can aid the appellants. The assignment of errors cannot inject into the record a Federal question not properly raised and presented to the court below by the record.

Fowler *v.* Lamson, 164 U. S. 252.
Cleveland & Pittsburgh R.R. *v.* Cleveland, 235 U. S. 50, 53.

Nor does the allowance of a writ of error establish that a Federal question was duly raised and decided by the State Court.

Hulbert *v.* Chicago, 202 U. S. 275, 280.
California Powder Works *v.* Davis, 151 U. S. 389, 393.

Even a certificate by the court below that a Federal question was duly raised and decided will not sustain jurisdiction here where the record fails to support the certificate.

Seaboard Air Line *v.* Duvall, 225 U. S. 477.
Cleveland & Pittsburgh R.R. *v.* Cleveland, 235 U. S. 50.
Marvin *v.* Trout, 199 U. S. 212, 223.

Under these circumstances the Treasurer and Receiver General respectfully urges that the record fails to sustain the appellate jurisdiction of this court and that the writ of error should be dismissed on that ground. The plaintiffs in error will suffer no constitutional wrong if the case be so dismissed for we shall show that even if this court had jurisdiction it should affirm the judgment below upon the merits.

II

Massachusetts has Jurisdiction to levy a Succession Tax on the Interests of Plaintiffs in Error

If the court holds that it has jurisdiction of the cause, the first question raised by the assignments of error is as to the jurisdiction of Massachusetts to levy a succession tax on these two interests. Massachusetts has such jurisdiction on two independent grounds, each sufficient in itself:

A. Each spendthrift trust of net income is a gift of intangible personalty which takes effect in possession and enjoyment upon the death of a grantor who was at all times domiciled in Massachusetts;

B. The Brooks trust itself was created in Massachusetts and has at all times been managed there by trustees domiciled in Massachusetts, so that the respective rights of Eleanor Saltonstall and Lawrence Brooks (both domiciled in Massachusetts) to require the trustees to pay over or apply the income of the trust as provided in the trust deed are "within the jurisdiction".

A. Massachusetts has Such Jurisdiction as the State of Domicil of the Grantor

It has long been settled that the state in which the owner of intangible personalty is domiciled may tax him thereon, even though such personalty has become taxable in some other state as well.

Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54.
Hawley *v.* Malden, 232 U. S. 1.
Maguire *v.* Trefry, 253 U. S. 12.

It is equally clear that the state of the donor's domicile may levy a succession tax upon intangible personalty which passes in enjoyment at his death, even though such personalty is subject to inheritance tax elsewhere.

Keeney *v.* New York, 222 U. S. 525.
Bullen *v.* Wisconsin, 240 U. S. 625.
Frick *v.* Pennsylvania, 268 U. S. 473.
Dana *v.* Treasurer & Receiver Gen., 227 Mass. 562.
Frothingham *v.* Shaw, 175 Mass. 59.
Matter of Jones, 172 N. Y. 575.
Estate of Stephenson, 171 Wis. 452.

Bullen *v.* Wisconsin, *supra*, goes far beyond the case at bar. In that case Bullen, who was originally domiciled in Illinois, and always kept his securities there, changed his domicile to Wisconsin, and thereafter, while temporarily in Illinois, conveyed his securities to an Illinois Trust Company in trust for himself for life and on his death to others. On his death Illinois, as the situs of the trust, exacted an inheritance tax (p. 631) and Wisconsin, as the state of domicile, likewise levied an inheritance

tax on the intangible personalty in the Illinois trust. This court held that Wisconsin, as the state of Bullen's domicile, had jurisdiction to impose that tax.

In the case at bar it is conceded that Peter C. Brooks, his wife, who predeceased him, his son and daughter (the plaintiffs in error) and the successive trustees have been at all times domiciled in Massachusetts (p. 13, pars. 5, 6, 7). The trustees were given sweeping powers with respect to investment and reinvestment by paragraph 13 of the trust deed (p. 8). The history of the changes of investment made between the creation of the trust on April 3, 1905, and the death of Peter C. Brooks on January 27, 1920, are set out fully in the petition (p. 13, par. 4; p. 14, 15, 16, pars. 9, 10, 11). During this period the Marquette Safety Deposit Company, an Illinois Corporation, was reorganized as a voluntary association (p. 16, par. 14), but the single justice has found as a fact (p. 3) and the Full Court has confirmed (p. 36, bottom) that under the law of Illinois, the shares in this association and also in the Chicago Real Estate Trust are personalty and have been personalty from the formation of the trusts. On January 27, 1920 (the date of the settlor's death) the value of the *corpus* was $5,333X, divided as follows (p. 16, par. 12):

(*a*) In shares of the Marquette Trust, approximately . . .	$1,075X
(*b*) In stocks in foreign corporations, approximately . . .	1,844X
(*c*) In cash, bonds and notes, approximately	2,185X
(*d*) In shares in the Chicago Real Estate Trust, approximately	85X
(*e*) In stocks of Massachusetts corporations and in voluntary associations other than the Marquette Trust and the Chicago Real Estate Trust, approximately	144X
Total	$5,333X

Shares in domestic and foreign corporations are intangible personalty subject to property and succession taxes at the domicile of the owner.

Frick *v.* Pennsylvania, 268 U. S. 473.
Hawley *v.* Malden, 232 U. S. 1.
Frothingham *v.* Shaw, 175 Mass. 59.
Bellows Falls P. Co. *v.* Com., 222 Mass. 51.

It follows that the *corpus* of the trust from its creation to the time of the grantor's death has always consisted of intangible personalty. Such indeed was the express intention of the grantor, for he provides in paragraph 6 of the trust deed (p. 5):

"6. All real estate at any time subject to any of the trusts herein expressed shall at all times be considered as personal estate for the purposes of enjoyment and transmission."

Thus even if Eleanor Saltonstall and Lawrence Brooks had taken absolute interests in a *corpus* which is wholly intangible personalty, those interests would necessarily be intangible personalty and so subject to succession tax by the state of the grantor's domicile.

But neither Mrs. Saltonstall nor Lawrence Brooks takes an absolute interest in the *corpus*. Paragraph 2 of the trust (p. 2) as originally framed, defined their respective interests as follows:

"2. After my death my trustees shall pay the net income of one third part of the trust property to my wife Sarah Lawrence Brooks during her life. And as to the two other third parts and after her death as to the whole of the trust property my trustees shall hold the same in trust for my children Eleanor Saltonstall wife of Richard Middlecott Saltonstall and Lawrence Brooks in equal shares. And the share of each of my said children in the trust property shall be held by my trustees in trust to pay the net income thereof to him or her quarteryearly or oftener during his or her life and so that he or she shall not have power to dispose of the same by anticipation or to subject the same to his or her debts or liabilities."

Mrs. Brooks died before Mr. Brooks (par. 8, p. 14), so that her interest never took effect in enjoyment. By the amendment of January 6, 1906, the provision for Lawrence was modified by giving to the trustees a further discretionary power to apply his share of the income for his benefit, to pay it over to his guardians or to accumulate it for him. This amendment is set out in the record at p. 22, and is indicated in the trust deed in italics on p. 2 of the additional record. The court held that upon Mr. Brooks' death Mrs. Saltonstall took in enjoyment for life (p. 31):

> . . . "not an absolute right to the designated share of the income with the power of alienating it in advance, but only the right to receive that share of income, which became her absolute property only on payment to her and not before. Broadway National Bank *v.* Collier, 222 Mass. 390; Haskell *v.* Haskell, 234 Mass. 442."

See Eaton *v.* Boston Safe Deposit & Trust Co., 240 U. S. 427.
See Shelton *v.* King, 229 U. S. 90.

Lawrence's spendthrift trust of net income for life is further qualified by the discretionary power given to the trustees (p. 31). Manifestly, neither will ever receive a dollar of the *corpus*. The interest which each took in enjoyment on the grantor's death is only a chose in action, namely, a right for life to compel the trustees to pay over or (in Lawrence's case) to apply the income as provided in the trust instrument. Such a chose in action is manifestly intangible personal property, the devolution of which on death is subject to succession tax at the grantor's domicile.

Bullen *v.* Wisconsin, 240 U. S. 625.
Keeney *v.* New York, 222 U. S. 525.

B. Massachusetts has Such Jurisdiction as the State of the Situs of the Trust.

Not only was the trust created in Massachusetts by a grantor domiciled there, by means of a conveyance to trustees there resident, for the benefit of Massachusetts beneficiaries, but the situs of the trust has always been in Massachusetts (p. 13). It is admitted in the petition that the trust has always been managed by the trustees in Boston, Massachusetts, and that the securities and cash owned by the trustees have been at all times kept there (p. 13, par. 6). The single justice has found that the income, so far as payable to any beneficiary, has been paid in or from Massachusetts, and that since the Massachusetts Income Tax took effect in 1916, the trustees have made annual fiduciary returns thereunder, and have paid income taxes to Massachusetts on account of the trust property (p. 11). He has further found that in the nine states in which are incorporated the corporations in which the trustees, at the grantor's death, held stock as part of the *corpus* of the trust (see p. 10) spendthrift trust restrictions would be upheld and enforced (p. 4); that it does not appear that in any of said states a non-resident beneficiary under a spendthrift trust can maintain a suit to establish his rights unless he can obtain personal service within the state upon the trustee (p. 4); and that no beneficiary has resorted to any court to enforce rights under the trust (p. 11). Moreover, the trust deed (Add. Rec. par. 18, p. 9) expressly provides:

"This instrument shall be construed and take effect in all respects according to the law of Massachusetts, and in the same manner as if all real and personal estate comprised in it were situate in Massachusetts and governed by the law of that state."

The *corpus* of such a trust manifestly has its *situs* within the jurisdiction of Massachusetts.

Blackstone *v.* Miller, 188 U. S. 189.
Wheeler *v.* Sohmer, 233 U. S. 434.
Bullen *v.* Wisconsin, 240 U. S. 625, 631.
Iowa *v.* Slimmer, 248 U. S. 115, 120.
Wachovia Bank & Trust Co. *v.* Doughton, 272 U. S. 568, 573.
Bliss *v.* Bliss, 221 Mass. 201.
Walker *v.* Treasurer & Receiver General, 221 Mass. 600.

It is the duty of the trustees to collect the gross income of the trust into Massachusetts, to pay or provide for the expenses of the trust, and then (and not till then) to pay over or apply the net income subject to the spendthrift limitations imposed by the trust deed. The gross income, when so collected, is property within the jurisdiction of Massachusetts. (Kennedy *v.* Hodges, 215 Mass. 112, 116.) This fund is necessarily the source of all payments of net income to beneficiaries. All such payments to beneficiaries have in fact been made in or from Massachusetts (p. 11) by trustees there resident, who have there managed the trust (p. 13), and who have there paid income taxes upon the income of the trust (p. 11). As the court below points out, Massachusetts is the only state where either beneficiary can effectively enforce his or her spendthrift trust of net income by legal proceedings (p. 37). Not only the *corpus* of the trust, but also the gross income and the net income have their *situs* in Massachusetts.

It is settled that a debt due from a resident of Massachusetts to a non-resident is property within the jurisdiction of Massachusetts, because the creditor must resort to the courts of the latter state to enforce it.

Blackstone *v.* Miller, 188 U. S. 189.
Bliss *v.* Bliss, 221 Mass. 201.

Income derived by non-residents from business conducted within a state is within its jurisdiction and may be taxed by it.

Shaffer *v.* Carter, 252 U. S. 37.
Travis *v.* Yale & Towne Mfg. Co., 252 U. S. 60.

Stock in corporations organized under the laws of a state is subject to inheritance tax there because the donee must go to such state to secure transfer.

Frick *v.* Pennsylvania, 268 U. S. 473.
Frothingham *v.* Shaw, 175 Mass. 59.

So also, interests passing by death in a trust actually managed within the state are there subject to succession tax.

Iowa *v.* Slimmer, 248 U. S. 115, 120.
Bullen *v.* Wisconsin, 240 U. S. 625, 631.
See also Wachovia Bank & Trust Co. *v.* Doughton, 272 U. S. 568, 575.
See also Walker *v.* Treasurer & Receiver General, 221 Mass. 600.

Under these circumstances, Massachusetts has jurisdiction to levy a succession tax on the interests of Mrs. Saltonstall and Lawrence Brooks, which were created by a resident of Massachusetts under the laws of Massachusetts, which from the beginning have been protected by those laws, and which, upon the grantor's death, passed under those laws in enjoyment to Massachusetts beneficiaries, who must (if necessary) resort to the courts of Massachusetts to enforce them against trustees there resident who have from the beginning managed the trust in that state.

III

The Several Statutes held Applicable by the Court to the Interests of Plaintiffs in Error are not Repugnant to the Federal Constitution

The deed of trust was executed on April 3, 1905, and certain additional securities were conveyed to the trustees by the settlor between that date and June 24, 1907 (p. 12, par. 2). The court holds that under the deed the interests of the plaintiffs in error did not take effect in possession and enjoyment until the death of the donor (p. 34, bottom), which occurred on January 27, 1920 (p. 14, par. 8) *after* all the statutes held applicable were in force.

A. The Applicable Provisions of St. 1916, c. 268.

The *succession* tax act at that time in force was St. 1916, c. 268, the material parts of which read as follows (see p. 31):

"Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, . . . which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, . . . made or intended to take effect in possession or enjoyment after the death of the grantor or donor . . . absolutely or in trust, . . . shall be subject to a tax as follows: . . .

"Section 4. This act shall take effect upon its passage, but it shall apply only to property or interests therein passing or accruing upon the death of persons who die subsequently to the passage hereof. Property or interests therein passing or accruing upon the death of persons dying prior to the passage hereof shall remain subject to the laws then in force."

The court holds that this act imposes an excise upon the privilege of "succession"; that the privilege of suc-

cession includes the privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property; that the privilege is not fully exercised until the property shall have come into the possession of the beneficiary (p. 33); and that St. 1916, c. 268 is therefore applicable to the interests of plaintiffs in error, which took effect in enjoyment at the grantor's death on January 27, 1920 (p. 34–35), the rate of tax under that act not being drawn in question.

B. The Applicable Provisions of St. 1909, c. 527, § 8.

St. 1909, c. 527, sec. 8, provides in part as follows:

"Section 8. Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure. . . ."

It is unquestioned that the Brooks Trust is a disposition of property made on April 3d, 1905, and so prior to September 1, 1907. Paragraph 19 of that trust (Add. Rec. p. 9) provides as follows:

> "19. The terms and provisions of this instrument and the dispositions hereinabove made may be changed from time to time during my life by writings signed by one or more of my trustees and by me and the trusts hereby created may at any time during my life be terminated as to all or any part of the property which may be subject to the trusts hereby created by writings signed by one or more of my trustees and by me. In case of such termination so much of the trust property as to which the trust has been terminated shall be conveyed and transferred to me at such time as I shall in writing require my trustees so to do. No person shall be bound or affected by any such change or termination or by any change in the trustees hereunder unless he has actual notice thereof."

The court holds that this paragraph conferred on Mr. Brooks and any trustee a power of appointment within the meaning of St. 1909, c. 527, sec. 8 (p. 34). The record discloses that during Mr. Brooks' life this power was thrice exercised in such a way as to modify or affect the interests which plaintiffs in error took in enjoyment at Mr. Brooks' death (p. 22–25). The court further holds that the partial failure of Mr. Brooks to exercise this power of appointment "contributes to, if it does not cause, the coming into possession of the son and daughter as beneficiaries" (p. 34) upon the death of Mr. Brooks, and so constitutes a taxable disposition of property within the meaning of St. 1909, c. 527, sec. 8, which subjects those interests to inheritance tax at the rates prescribed by St. 1916, c. 268.

It thus appears that the interests of plaintiffs in error are liable to inheritance tax at the rates in force at Mr.

Brooks' death upon two different grounds each sufficient in itself:

1. The privilege of succession was not fully exercised until the interests of plaintiffs in error took effect in possession and enjoyment upon the death of the grantor on January 27, 1920, within the meaning of St. 1916, c. 268, sec. 1, which was at that time in force.

2. The privilege of succession was not fully exercised until the death of Mr. Brooks on January 27, 1920, terminated the power of appointment given to him and any trustee by paragraph 19 of the deed, whereby his partial failure to exercise the power became a taxable disposition of property within the meaning of St. 1909, c. 527, sec. 8, which was in force at his death.

Thus, while each interest is subject to only one succession tax at the rates prescribed by St. 1916, c. 268, the *liability to the tax* may be rested either upon St. 1909, c. 527, sec. 8, or upon St. 1916, c. 268, sec. 1. It follows that the tax must stand unless *both acts* are held to be unconstitutional.

C. The Applicable Provisions of St. 1919, c. 342, § 4.

St. 1918, c. 191, provides:

"Section 1. All property subject to a legacy and succession tax under the provisions of section one of chapter five hundred and sixty-three of the acts of nineteen hundred and seven, codified as section one of Part IV of chapter four hundred and ninety of the acts of nineteen hundred and nine, as amended by section one of chapter two hundred and sixty-eight of the General Acts of nineteen hundred and sixteen, and of any further amendments thereof or additions thereto, shall be subject to an additional tax of twenty-five per cent of all taxes imposed thereon by the said acts. All provisions of law relative to the determination, certification, payment, collection and abatement

of such legacy and succession taxes shall apply to the additional tax imposed by this act.

SECTION 2. This act shall take effect upon its passage, but it shall apply only to property or interests therein passing or accruing upon the death of persons who die subsequent to the passage hereof and within one year thereafter."

It was revived and re-enacted by St. 1919, c. 342, sec. 4, approved July 22, 1919, which provides:

"SECTION 4. Chapter one hundred and ninety-one of the General Acts of nineteen hundred and eighteen is hereby revived and re-enacted, and made applicable to property or any interest therein passing or accruing upon the death of persons who died subsequent to the passage hereof and within one year thereafter or who have died in the interval between the third day of May in the current year and the date of said passage."

Of these acts the court says (p. 33):

"The additional taxes provided by St. 1918, c. 191, and St. 1919, c. 342, sec. 4 are pertinent, but no separate question of law is raised touching them and they need not be considered in detail."

It is plain that the constitutionality of these additional acts is governed by the principles applicable to St. 1916, c. 268. They were held to be constitutional in Magee *v.* Treasurer & Receiver General, 256 Mass. 512.

D. CERTAIN MATTERS DETERMINED BY THE COURT BELOW ARE ACCEPTED BY THIS COURT.

This court accepts the construction placed upon these several statutes by the court below. Chanler *v.* Kelsey, 205 U. S. 466, 477; Stebbins *v.* Riley, 268 U. S. 137, 146. It will therefore accept the decision of that court that these statutes impose an excise upon the privilege of

succession, and that such privilege of succession is not fully exercised until the gift takes effect in possession and enjoyment. Even if this question were open, it is settled adversely to plaintiffs in error by a long line of Massachusetts cases.

In Crocker *v.* Shaw, 174 Mass. 266, the court said by Morton, J.:

(p. 268) "It is the vesting of the property in possession and enjoyment on the death of the grantor and after the statute took effect that renders it liable to the tax, and both of those things happened in this case."

In Attorney General *v.* Stone, 209 Mass. 186, the court said by Sheldon, J.:

(p. 190) "This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with. The privilege is not fully exercised until the property shall have come into the possession of the beneficiary."

This statement of Justice Sheldon is quoted with approval and applied in Burnham *v.* Treasurer & Receiver General, 212 Mass. 165, 167.

In Attorney General *v.* Clark, 222 Mass. 291, the court again said by Crosby, J.:

(p. 294) "The statute under consideration authorizes the imposition of an excise tax. It is so imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of the beneficiary to receive such property."

In Plunkett *v.* Old Colony Trust Co., 233 Mass. 471, Chief Justice Rugg said:

(p. 474) "It was said in Minot *v.* Winthrop, 162 Mass. 113, 124, 'the right or privilege taxed can perhaps be regarded either as the right or privilege of the owner of property to transmit it on his death by will or descent, to certain persons, or as the right or privilege of these persons to receive the property.'"

In Pratt *v.* Dean, 246 Mass. 300, 308, the court said by Rugg, C.J.:

"The tax is imposed not upon the property, but upon the right to receive property by reason of the death of the testator or donor."

In Magee *v.* Treasurer & Receiver General, 256 Mass. 512, the question was whether St. 1919, c. 342, sec. 4 (*supra*), which took effect on July 22, 1919, was constitutional as applied to the will of a testatrix who died on July 6, 1919, which was proved and allowed on August 4, 1919. In holding the tax to be prospective and the act to be constitutional, the court said by Rugg, C.J.:

"Doubtless the right to share in the estate, real and personal, according to the terms of the will vested in the beneficiaries of the direct gifts immediately on the death of the testatrix. Davis *v.* Newton, 6 Met. 537, 541. Hooper *v.* Bradford, 178 Mass. 95, 97. Kingsbury *v.* Chapin, 196 Mass. 533, 538. To that extent all the rights involved were vested. The commodity known as succession, however, had not come to an end until after the statute became effective. Clearly this was so as to personal property. Possession and title to that vested in the executors and must be handed over by them to the beneficiaries under the will. It was also true of the real estate. That was subject to be sold to satisfy debts, legacies and charges of administration during the appropriate period of administration. R. L., c. 146, § 1, now G. L., c. 202, § 1. Moreover, it is said in the record in the case stated that 'on July 22, 1919, the date upon which St. 1919, c. 342, went into effect, the estate of the said Harriet M. Magee had not in any-

wise been fully administered nor had any of the persons beneficially interested under the said will received in any purported distribution any of the property passing thereunder.' It follows that in the case at bar a commodity, as that word of the Constitution has been described in our decisions, still existed when said c. 342 was enacted, which might be made subject to the excise. The commodity of succession was not complete as to the element of possession and enjoyment of the property passing when said c. 342 took effect.

. . . . . .

"The statute here attacked as applied to the estate of the testatrix is not open to objections on constitutional grounds. It does not in truth operate retroactively with reference to the present estate. The tax was imposed upon a commodity still in existence when the statute went into effect."

This court also accepts and is bound by the construction placed by the court below upon the deed of trust.

> Nickel *v.* Cole, 256 U. S. 222, 225.
> Enterprise Irrigation District *v.* Canal Co., 243 U. S. 157, 164.

It is therefore not open to question here that the interests of plaintiffs in error took effect in possession and enjoyment at Mr. Brooks' death on January 27, 1920, within the meaning of St. 1916, c. 268, sec. 1. Even if that question were open, it is settled adversely to plaintiffs in error.

> New England Trust Co. *v.* Abbott, 205 Mass. 279.
> State Street Trust Co. *v.* Treasurer & Receiver General, 209 Mass. 373.
> Pratt *v.* Dean, 246 Mass. 300, 307.

There is nothing to the contrary in Welch *v.* Treasurer & Receiver General, 217 Mass. 348. In so far as that

case holds that the deed there in question took effect in possession and enjoyment upon the death of the donor, it is an authority which supports this defendant in error. In so far as it holds that that deed was not taxable under an earlier act, St. 1907, c. 563, because sec. 25 of that act expressly provided that it should not apply to deeds "made" prior to its passage, it is distinguishable, in that St. 1916, c. 268, sec. 4, provides that that act shall apply "to property or interests therein passing or accruing upon the death of persons who die subsequently to the passage hereof." (See p. 34, 36.)

It is also not open to question here that paragraph 19 of the trust deed confers upon Mr. Brooks and any trustee a power of appointment, or that the partial failure of Mr. Brooks to exercise it contributed to the taking in possession and enjoyment by plaintiffs in error upon Mr. Brooks' death in January, 1920, and so constituted a taxable disposition of property within the meaning of St. 1909, c. 527, sec. 8. Even if that question were open, it is settled adversely to plaintiffs in error.

Minot *v.* Treasurer & Receiver General, 207 Mass. 588.

Burnham *v.* Treasurer & Receiver General, 212 Mass. 165.

Lines Estate, 155 Pa. St. 378, 393.

Manning *v.* Board of Tax Commissioners, 46 R. I. 400, 404.

See also Bullen *v.* Wisconsin, 240 U. S. 625.

There is nothing in the Welch case (217 Mass. 348) to the contrary. In that case the grantor, who had power to revoke the gift, died in October, 1907, about two years before St. 1909, c 527, sec. 8, was passed. Hence no question arose or could arise as to the effect under that act, of the failure to revoke.

In Dexter *v.* Treasurer & Receiver General, 243 Mass. 523, the deed of trust, which took effect in enjoyment immediately, and not upon the death of the grantor, was made in 1913 (p. 524). St. 1909, c. 527, sec. 8, is expressly confined to "a disposition of property made prior to September 1, 1907." As the Dexter deed was thus expressly excluded from the operation of that act, no question could arise as to the effect of it upon the power of revocation reserved by that deed.

E. The Precise Issues Presented.

As the tax here assailed must stand unless *both* these statutes are held to be unconstitutional, it follows that the only remaining questions presented to this Court (if the Court has jurisdiction) are:

1. Whether *each* act as so construed and applied impairs the obligation of contract, contrary to U. S. Cons., Art. I, Sec. 10.

2. Whether *each* act as so construed and applied deprives plaintiffs in error of property without due process of law or denies to them the equal protection of the law contrary to the Fourteenth Amendment.

Reduced to its lowest terms, the general question presented is whether a statute which imposes a *succession* tax upon the exercise of the privilege of succession, before that privilege is fully exercised by taking in enjoyment, is repugnant to the Contract clause or to the Fourteenth Amendment.

F. These Acts are Constitutional.

It is settled that a state may impose an excise upon the privilege of the donee to *succeed* to the property in possession and enjoyment upon the death of the grantor,

as well as upon the privilege of the grantor so to *transfer* it.

Stebbins *v.* Riley, 268 U. S. 137.

The principle is thus stated in the Stebbins case, *supra*, which held that *both* privileges might be taxed simultaneously:

(p. 141) "The subject matter of an inheritance taxing statute may be either the transmission or the exercise of the legal power of transmission of property by will or descent (citing cases), or it may be the legal privilege of taking property by devise or descent (citing cases).

. . . . . .

(p. 144) "There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. *Each as we have seen is the subject of taxation.*" (Italics ours.)

See also Moffitt *v.* Kelly, 218 U. S. 400, 404.

Moreover, the privilege of succession may be exercised in respect to a gift by deed as well as in respect to a gift by will.

Chanler *v.* Kelsey, 205 U. S. 466.
Nickel *v.* Cole, 256 U. S. 222.
Bullen *v.* Wisconsin, 240 U. S. 625.

Hence a statute which imposes an excise upon the privilege of succession before that privilege is fully exercised by taking in enjoyment, does not impair the obligation of contract, whether the succession takes place by will or by deed.

Carpenter *v.* Pennsylvania, 17 How. 456.
Orr *v.* Gilman, 183 U. S. 278.

Chanler *v.* Kelsey, 205 U. S. 466.
Moffitt *v.* Kelly, 218 U. S. 400, 402.
Nickel *v.* Cole, 256 U. S. 222.
See also Corry *v.* Mayor & City Council of Baltimore, 196 U. S. 466.

So also a statute imposing a *succession* tax, which is passed before the privilege of succession is fully exercised by taking in enjoyment at the grantor's death, does not take the donee's property without due process of law or deny to the donee the equal protection of the laws, contrary to the Fourteenth Amendment.

Orr *v.* Gilman, 183 U. S. 278.
Cahen *v.* Brewster, 203 U. S. 543.
Chanler *v.* Kelsey, 205 U. S. 466.
Moffitt *v.* Kelly, 218 U. S. 400, 405.
Nickel *v.* Cole, 256 U. S. 222.
Wachovia Bank & Trust Co. *v.* Doughton, 272 U. S. 568, 573.
Crocker *v.* Shaw, 174 Mass. 266.
Minot *v.* Treasurer & Receiver General, 207 Mass. 588.
Attorney General *v.* Stone, 209 Mass. 186.
Burnham *v.* Treasurer & Receiver General, 212 Mass. 165.
Magee *v.* Treasurer & Receiver General, 256 Mass. 512.
Congregational Home Missionary Society *v.* Bugbee, 101 N. J. L. 214 (N. J. Er. & Ap.).
American Board of Commrs. *v.* Bugbee, 98 N. J. L. 84, 86.
State *v.* District Court, 70 Mont. 322.
In re Short's Estate, 16 Pa. St. 63.
Manning *v.* Board of Tax Commissioners, 46 R. I. 400, 411–415.

Thus in the Wachovia case, *supra*, this court said by Reynolds, J. (p. 573):

"In Orr *v.* Gilman, 183 U. S. 278, and Chanler *v.* Kelsey, 205 U. S. 466, this court held that by an act passed subsequent to the instrument which created a power of appointment New York might tax its execution without violating the Fourteenth Amendment."

The principle that an excise may be imposed *upon the privilege of succession* at any time before that privilege is fully exercised, extends to and embraces cases where the excise is imposed by an act passed after the interest has vested in law, but before it has taken effect in possession and enjoyment.

Carpenter *v.* Pennsylvania, 17 How. 456.
Cahen *v.* Brewster, 203 U. S. 543.
Moffitt *v.* Kelly, 218 U. S. 400.
Nickel *v.* Cole, 256 U. S. 222.
Attorney General *v.* Stone, 209 Mass. 186.
Burnham *v.* Treasurer & Receiver General, 212 Mass. 165.
Magee *v.* Treasurer & Receiver General, 256 Mass. 512.
State *v.* District Court, 70 Mont. 322.
Congregational Home Missionary Society *v.* Bugbee, 101 N. J. L. 214 (N. J. Er. & Ap.).
American Board of Commr's *v.* Bugbee, 98 N. J. L. 84, 86.
Manning *v.* Board of Tax Commissioners, 46 R. I. 400.

There is nothing to the contrary in Nichols *v.* Coolidge, 47 Sup. Ct. 710; 1927 Adv. O. 797. That case

related to the *Estate Tax* imposed by the Federal Act of February 24, 1919. An *estate tax* is an excise upon the interest which ceases by reason of death (Young Men's Christian Association *v.* Davis, 264 U. S. 47, 50; Edwards *v.* Slocum, 264 U. S. 61, 62; Knowlton *v.* Moore, 178 U. S. 41, 49) and is therefore an excise upon the privilege of *transmission* by the donor (New York Trust Co. *v.* Eisner, 256 U. S. 345, 349–350), while a *succession tax* includes an excise upon the privilege of the donee to succeed to the property by reason of death (Stebbins *v.* Riley, 268 U. S. 137, 141). The one is an excise upon the privilege of giving by the donor, the other embraces the privilege of receiving in enjoyment by the donee.

All that the Coolidge case decides is that Congress cannot include in the estate of the *donor*, and subject to estate tax at the value thereof at the time of his death, property in which he then had no interest because he had wholly and completely transferred it before the statute was passed, even though certain future interests therein took effect in enjoyment at his death. Even if we suppose without conceding, that the case goes so far as to hold that a retroactive *estate tax* cannot be imposed on the *donor*, with respect to property in which he has completely ended his interest by *transfer* before the act is passed, it neither decides nor purports to decide that a state cannot impose a *prospective succession* tax on the *donee* by an act passed before the privilege of succession is fully exercised by taking in enjoyment. The fundamental difference in the nature of the tax, and in the nature of the privilege taxed, in that case and in this, is expressly pointed out by the court at p. 713:

"The exaction is not a succession tax like the one sustained in Scholey *v.* Rew, 23 Well 331; Keeney *v.* New York, 222

U. S. 525. *The right to become beneficially interested is not the occasion for it.*" (Italics ours.)

The Coolidge case leaves unshaken Cahen *v.* Brewster, 203 U. S. 543, and like cases, which hold that a *succession* tax may be imposed on the donee at any time before the privilege of succession is completely exercised by taking in enjoyment. Those cases govern the case at bar.

State cases like Matter of Pell, 171 N. Y. 48 and Matter of Lansing, 182 N. Y. 238, are distinguishable for the same reason as the Coolidge case. Analysis shows that the statutes considered in these cases were held to impose an excise upon the privilege of transfer by the donor, and were held unconstitutional in so far as they imposed a retroactive transfer tax upon the donor in respect to transfers wholly complete so far as he was concerned before the statute was passed. Those cases decide nothing as to the power of the legislature to impose a prospective succession tax upon the *donee* before he has fully exercised the succession privilege by taking in possession and enjoyment. See Manning *v.* Board of Tax Commissioners, 46 R. I. 400, 410.

Nor does Schlesinger *v.* Wisconsin, 270 U. S. 230, aid the plaintiffs in error. All that that case decided was that a statute which established a conclusive presumption, not rebuttable by evidence, that all gifts made within six years prior to death were made in contemplation of death, is so arbitrary as to offend against the Fourteenth Amendment. It does not decide that an excise upon the privilege of succession, imposed before the privilege is fully exercised by taking in enjoyment at the donor's death and measured by the value of the property to which the donee succeeds at that time is arbitrary or unreasonable.

As applied to the case at bar St. 1916, c. 268, is well within the line of power traced by these cases. Whether

the interests of plaintiffs in error were or were not vested in law, they remained destructible up to the moment of the grantor's death. Up to that time he and any trustee might have changed, modified or defeated those interests by exercising the power of appointment conferred by paragraph 19 of the trust deed. One or both were in fact thrice modified by the exercise of that power. The absolute appointment of $52,000 of American Telephone stock to Mrs. Saltonstall on March 15, 1909 (p. 16, 25), contrasts with the future interest which she did not take in enjoyment until Mr. Brooks' death on January 27, 1920. As the interests of plaintiffs in error remain destructible until they take effect in possession and enjoyment upon the death of the grantor, it may well be held that the privilege of succession is not fully exercised until that time (see Bullen *v.* Wisconsin, 240 U. S. 625) and that St. 1916, c. 268, as applied to such interests, is well within Cahen *v.* Brewster, 203 U. S. 543, and similar authorities.

As applied to the case at bar St. 1909, c. 527, sec. 8, not only comes within the principle that an excise may be imposed until the privilege of *succession* has been fully exercised by the donee, but also within the principle that an excise may be imposed until the privilege of *transmission* has been fully exercised by the donor. Both privileges may be simultaneously subjected to an excise.

Stebbins *v.* Riley, 268 U. S. 137.

It is settled that non-exercise of a power of appointment is a taxable disposition of property in favor of those who take in default of appointment, just as the exercise of the power is a taxable disposition in favor of the appointee.

Minot *v.* Treasurer & Receiver General, 207 Mass. 588.

Burnham *v.* Treasurer & Receiver General, 212 Mass. 165.
Lines Estate, 155 Pa. St. 378, 393.
Manning *v.* Board of Tax Commissioners, 46 R. I. 400, 404.
See also Bullen *v.* Wisconsin, 240 U. S. 625.

If, as in the case at bar, the donee of the power partially exercises it, but permits the gift in default of appointment to take effect in part, such abstaining from further exercise of the power is to that extent a continuing confirmation of the gift in default of appointment, which becomes a completed disposition only as and when it takes effect in enjoyment. It is settled that an excise statute passed after the power is conferred, but before it is exercised, is constitutional as applied to a subsequent exercise of the power.

Orr *v.* Gilman, 183 U. S. 278.
Chanler *v.* Kelsey, 205 U. S. 466.
Wachovia Bank and Trust Co. *v.* Doughton, 272 U. S. 568, 573.
Crocker *v.* Shaw, 174 Mass. 266.

But if non-exercise of the power is a continuing disposition in favor of the donees in default of appointment, it is equally within these decisions if such continuing disposition takes effect in enjoyment after an appropriate excise statute is passed — and so the cases previously cited hold. It follows that St. 1909, c. 527, sec. 8, is prospective and valid as applied to the interests of the plaintiffs in error, not only because at the time it was passed the privilege of succession had not been fully exercised by the donee, but also because the privilege of transmission had not then been fully exercised by the donor.

Minot *v.* Treasurer & Receiver General, 207 Mass. 588.
Burnham *v.* Treasurer & Receiver General, 212 Mass. 165.
Manning *v.* Board of Tax Commissioners, 46 R. I. 400.

The Manning case, *supra*, is especially persuasive in this respect, because, after elaborate consideration of the decisions it rejects the narrower New York view and applies the Massachusetts authorities to a future gift in default of appointment which was absolutely vested in law at the time the statute was passed but which was still subject to destruction by the exercise of the power until it thereafter took effect in enjoyment.

CONCLUSION.

1. The writ should be dismissed for want of jurisdiction. The record fails to show that plaintiffs in error presented any *Federal* question to the court below. They cannot sustain jurisdiction here upon the abundant caution of that court in pointing out, in what at most is a *dictum*, that the construction which it placed upon the statutes which it held applicable did not subject them to constitutional attack.

2. If the question is open, it is clear that Massachusetts has jurisdiction to impose a succession tax upon the spendthrift trusts of net income which the plaintiffs in error took in enjoyment for life upon the death of the donor, Peter C. Brooks. Those spendthrift trusts of net income are intangible personalty. The jurisdiction of Massachusetts to impose a succession tax thereon may be rested upon the conceded fact that Peter C. Brooks, the donor, was at all times domiciled in Massachusetts, and also upon the further fact that since its creation the

situs of the trust has been in Massachusetts, and the plaintiffs in error must (if necessary) resort to the courts of that state to enforce it.

3. If the question is open, it is plain that the several acts held applicable by the court are not repugnant either to the contract clause or to the Fourteenth Amendment. St. 1916, c. 268, imposes an excise upon the privilege of succession by the donee. That privilege is not fully exercised until the donee takes in possession and enjoyment upon the death of the donor. The death of the donor occurred on January 27, 1920. St. 1916, c. 268, was in force at that time. The excise was therefore imposed by an act passed *before* the privilege of succession was fully exercised by these donees. Like considerations sustain St. 1909, c. 527, sec. 8. That act was passed not only before the privilege of succession was fully exercised by the donees, but also before the privilege of transmission was fully exercised by the donor. Both statutes are therefor prospective, not retroactive as applied to plaintiffs in error. Such a prospective tax neither impairs the obligation of contract nor conflicts with the Fourteenth Amendment.

We therefore respectfully submit that the writ should be dismissed for want of jurisdiction, and, if the writ is not so dismissed, that the judgment below should be affirmed.

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